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No. 92-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRAXSTON LEE BANKS,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has a student-athlete stated a claim under Section 1 of the Sherman Act where he alleges that he has been injured by an agreement among members of the NCAA not to allow any student-athlete to play a sport for any NCAA school if the student-athlete has (i) unsuccessfully entered a professional draft in that sport or (ii) agreed to allow a lawyer to represent him in discussions with a professional team, even where the athlete was not drafted, never signed a professional contract, and never accepted any payment for his services?

2. In an antitrust case challenging an agreement among competitors under the Rule of Reason, may a court, without any evidence in the record, conclude that the agreement is procompetitive based solely on the assertions in the defendant's legal memoranda?

3. Did the court of appeals err in reversing the district court's refusal to find petitioner's class claim for injunctive relief moot, based on the appellate court's assessment of facts that were neither presented to, nor found by, the district court?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the caption, the University of Notre Dame was originally a party in the district court, but was voluntarily dismissed from the case on August 30, 1990.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

1. The NCAA No-Draft and No-Agent Rules .. 3

2. Effect of the NCAA Eligibility Rules on Petitioner 5

3. Proceedings in the District Court 5

4. Proceedings in the Court of Appeals 10

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS CONTRARY TO THE ANTITRUST DECISIONS OF THIS COURT AND PRESENTS IMPORTANT ISSUES CONCERNING THE APPLICATION OF THE ANTITRUST LAWS 13

I. INTERCOLLEGIATE AGREEMENTS THAT RESTRICT ELIGIBILITY OF STUDENT-ATHLETES ARE NOT IMMUNE TO ANTITRUST CHALLENGE 15

II. THE RULE OF REASON CANNOT PROPERLY BE APPLIED TO ANALYZE AN AGREEMENT AMONG COMPETITORS WHERE THERE HAS BEEN NO DEVELOPMENT OF THE FACTS CONCERNING THE AGREEMENT'S COMPETITIVE EFFECTS..... 23

CONCLUSION 26

TABLE OF AUTHORITIES

Cases: **Page**

Association of Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577 (D.C. Cir. 1984) 26

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 21

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 16

Boris v. USFL, 1984-1 Trade Cas. (CCH) ¶ 66,012 (C.D. Cal. 1984) 21

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 21

Conley v. Gibson, 355 U.S. 41 (1957) 24

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 24

County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991) 9, 13

Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971) 21

Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072 (1992) 25

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 15, 24 25

Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990) 17

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 15

Jefferson Paris Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) 24

Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) 17

Linesman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977) 21

Maple Flooring Mfrs. Assn v. United States, 268 U.S. 563 (1925) 25

McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) 17

NCAA v. Board of Regents, 468 U.S. 85 (1984) . . . . . *passim.*

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 19, 24,

Nichols v. Spencer International Press, Inc., 371 F.2d 332 (7th Cir. 1967) 21

Radiant Burners v. Peoples Gas Light and Coke Co., 364 U.S. 656 (1961) 17

Radovich v. National Football League, 352 U.S. 445 (1957) 20

United States v. Brown University,
805 F. Supp. 288 (E.D.Pa. 1992), *appeal pend'ng*,
(3rd Cir.) 19

Statutes

28 U.S.C. § 1254(1) 2

Sherman Act, 15 U.S.C. § 1 . . . . . *passim.*

15 U.S.C. §§ 15, 26 6

Other Materials

II P. Areeda and D. Turner, *Antitrust Law* (1978) . . 21

Areeda, *The Rule of Reason -- A Catechism on Competition*, 55 Antitrust L. Rev. 571 (1986) . . . 26

Goldman, *Sports and Antitrust: Should College Athletes Be Paid to Play?*, 65 Notre Dame L.R.206 (1990) 16

Koch, *The Economic Realities of Amateur Sports Organization*, 61 Ind. L.J. 9 (1985) 16

Lock, *Unreasonable NCAA Eligibility Rules*, 20 Cap. Un. L. Rev. 643 (1991) 24

Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 Harv. L. Rev. 1301 (1992) 24

Stiglitz, *NCAA-Based Agent Regulation: Who Are We Protecting?*, 67 N. Dak. L. Rev. 215, 217-18 (1991) 8

In The

Supreme Court of the United States

October Term, 1992

No. 92-

BRAXSTON BANKS,

Petitioner,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 977 F.2d 1081, and is set forth in Petitioner's Appendix ("Pet. App.") at 1a-40a. The opinion of the United States District Court for the Northern District of Indiana denying petitioner's request for a preliminary injunction is reported at 746 F. Supp. 850, and is set forth in the Appendix at 41a-68a. The subsequent opinion of the district court granting respondent's motion to dismiss, and entering judgment in its favor, is not reported and is set forth in the Appendix at 69a-78a.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on October 13, 1992. A petition for rehearing and suggestion for rehearing *in banc* were denied on December 10, 1992. *See* 79a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, provides, in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal. . . .

STATEMENT OF THE CASE

This case involves the application of the antitrust laws to the Rules of the National Collegiate Athletic Association ("NCAA"), an association of the major universities that sponsor intercollegiate athletics in the United States. Petitioner's complaint alleges a horizontal agreement among the NCAA members not to deal with student-athletes who enter, but are not selected in, the draft for professional sports, or who retain an agent to help them make informed decisions about whether to remain in college or become professional athletes. A divided panel of the Seventh Circuit affirmed the district court's decision dismissing the complaint on the ground that these allegations do not state a claim under the Sherman Act. In doing so, the Circuit Court ruled that, notwithstanding this Court's decision in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), student-athletes cannot bring an antitrust challenge to agreements by intercollegiate athletic associations concerning their eligibility. In addition, even though this case was decided on a motion to dismiss and no evidence concerning the Rules' competitive impact had been presented by either side, the majority held that the alleged procompetitive impacts of the NCAA's Rules outweigh any anticompetitive effects.

This petition raises the question of whether this Court's decision in *NCAA v. Board of Regents* allows only the participants in intercollegiate associations to bring antitrust claims challenging the anticompetitive effects of agreements among the member schools, or whether students, who are not parties to such agreements, can also sue under the antitrust laws to challenge intercollegiate agreements that directly injure them. It also raises the question of whether it is proper for a court, when presented with allegations that competitors have collectively agreed to restrain competition, to decide that the alleged procompetitive effects of the agreement outweigh its anticompetitive effects under the Rule of Reason test, without any factual inquiry. Because the decision below is contrary to precedents of this Court on both of these issues, and because both issues have broad implications beyond this case, this Court should grant review.

1. The NCAA No-Draft and No-Agent Rules.

The NCAA is an association of approximately 1,017 colleges and universities whose purpose is to promote intercollegiate athletics in the United States, and it is the dominant association of colleges and universities that engage in intercollegiate athletics. The NCAA has adopted a series of substantive rules that relate to all intercollegiate sports. It also has rules and procedures for the enforcement of those rules, and it imposes sanctions against NCAA members who do not adhere to them. *See* Pet. App. 42a.

In this case petitioner, Braxston Lee Banks, challenged two of the eligibility Rules established by the members of the NCAA as horizonal agreements to restrain competition in violation of Section 1 of the Sherman Act. The first Rule is Rule 12.2.4.2, known as the "no-draft" Rule, which provides that a player becomes ineligible for participation in a particular intercollegiate sport if that player asks that his or her name be placed on a list of players available for the professional draft in that sport. *See id.* at 42a n.1 This "no-draft" Rule applies even if the player asks that his or her name be withdrawn before the

draft starts, even if the player goes through the draft but is not chosen, or even if the player is drafted, but does not sign a professional contract.[1]

The no-draft Rule, however, does not apply to a player who is a paid professional athlete in one sport, but who wishes to play intercollegiate athletics in another. In addition, the Rule does not apply where the student-athlete is drafted by a professional team without the student actually requesting to be placed in the draft. For example, both Major League Baseball and the National Hockey League allow franchises to draft student-athletes without requiring that the students affirmatively submit their names for the draft, and the students drafted in this way retain their NCAA eligibility despite the no-draft Rule (assuming that they do not sign a professional contract or are otherwise made ineligible). The Rule does, however, affect participants in NCAA intercollegiate football because the National Football League ("NFL") requires that individuals apply to be considered in the draft.

The second rule is Rule 12.3, known as the "no-agent" Rule. It provides that a player is ineligible for participation in any intercollegiate sport in which that player agrees (orally or in writing) to be represented by an agent, including an attorney, for the purpose of marketing that player's athletic ability or reputation in that sport. *See id.* at 43a n.2. The no-agent Rule applies even if the player receives no money or financial benefit from the agent or anyone else, even if the agent is a close friend or family member, and even if the agent has not charged, and agrees not to charge, the player any fee for the representation. There is a limited exception for consultation with lawyers, but even that exception is

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[1] At one point, the majority opinion below erroneously describes the no-draft rule as "denying a college football player the right to play professional football (entering the NFL draft) and then return to college football." 20a. As noted above, the Rule applies even if the player is *not* drafted, and never plays professionally. It is this application of the Rule that is the basis for petitioner's challenge here.

available only for advice concerning a proposed contract, and it does not apply if the lawyer is present during contract negotiations or has any direct contact with any team on behalf of the player. *Id.* Like the no-draft Rule, the no-agent Rule does not apply to a player who has retained an agent for one sport, but who wishes to play in another sport.

2. Effect of the NCAA Eligibility Rules on Petitioner.

Petitioner entered the University of Notre Dame, which is a member of the NCAA, in September 1986 on a full athletic scholarship, which was worth approximately $16,000 a year in 1990. He played running-back for Notre Dame for three years, but sat out his senior year due to a knee injury. Because he had played only three seasons at Notre Dame, petitioner was eligible to play again during the 1990 season. *See* Pet. App. 2a, 44a-45a.

In February 1990, petitioner applied to renew his grant-in-aid and continue his studies at Notre Dame. Notre Dame orally approved his application, which would have enabled him to play football for Notre Dame during the 1990 season. But in March petitioner declared his intent to enter the April 1990 NFL draft, which was held on April 22-23, 1990. In addition, after declaring his intent to enter the draft, petitioner retained an attorney to represent him. Of the 38 players who entered the 1990 draft with NCAA eligibility remaining, twenty, including petitioner, were not drafted by any team. After the draft, petitioner continued to seek a contract with a professional team, but was not successful. At no time did any team or agent pay petitioner any compensation, although he did receive travel reimbursements in connection with certain tryouts. Because of his lack of success, petitioner sought to return to Notre Dame to play an additional year of collegiate football, but was precluded from doing so by the NCAA's no-draft and no-agent Rules. *See id.* at 46a-49a.

3. Proceedings in the District Court.

On August 9, 1990, petitioner filed this action against the NCAA in the Northern District of Indiana, South Bend Division, alleging that both the no-draft and no-

agent Rules violated the Sherman Antitrust Act because they unreasonably restrained trade and commerce among the states. Subject matter jurisdiction was based on 15 U.S.C. §§ 15, 26. The original complaint had two causes of action. The first was on behalf of petitioner alone, and it sought injunctive relief restoring him to eligibility for another football season at Notre Dame. The second was a class claim brought under Rule 23(b)(2), seeking an injunction on behalf of present and future class members against enforcement of both Rules. Notre Dame was named as a defendant solely with respect to the petitioner's claim to restore his eligibility. *See* Pet. App. at 50a-51a.

Because football practice was to start at Notre Dame on August 17, petitioner filed a motion for a preliminary injunction with his complaint, supported by affidavits attesting to the fact that he had never entered into a professional contract or received compensation for playing professional football, and describing the unsuccessful efforts that petitioner and his counsel had made to resolve the dispute without litigation. His accompanying memorandum of law relied principally on this Court's ruling in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), for the propositions that the NCAA was subject to the antitrust laws and that the Rule of Reason was the test under which its agreements should be evaluated.

Notre Dame took no position on the motion, but the NCAA vigorously opposed it. First, the NCAA argued that its eligibility Rules are not subject to the Sherman Act because they "regulate the non-commercial activities of an organization dedicated to fostering amateurism in college sports." Pet. App. 53a. The district court rejected this argument, concluding that *Board of Regents* makes such Rules subject to scrutiny under the antitrust laws, albeit under the Rule of Reason rather than a *per se* analysis. *Id.* at 53a-56a. The district court also rejected the NCAA's claims that petitioner could not show "antitrust injury" and had failed to identify a market or an anticompetitive effect of the Rules. *Id.* at 57a-63a. It concluded that petitioner had "posited a credible anticompetitive effect" in that "the

'no-draft' Rule will deter better college football players from testing the waters of professional football for fear of finding themselves in the no-man's land in which Mr. Banks has placed himself. Accordingly, better players will remain in school and out of the NFL draft, enhancing the NCAA's already profitable market." *Id.* at 63a.

Finally, the NCAA argued that any anticompetitive effects of the Rules were outweighed by their procompetitive effects. Although the NCAA submitted four affidavits in support of its opposition, none of them offered any factual basis for the asserted procompetitive effects of the Rules, nor did they show that the Rules were reasonably necessary to advance their asserted goal of assuring amateurism in college sports. Nonetheless, the district court accepted the proposition that the "articulated procompetitive effects" argued in the NCAA's legal memorandum and at oral argument "outweigh[] the anticompetitive effects," and, therefore, denied the preliminary injunction on the grounds that petitioner had not established sufficient likelihood of success on the merits. *Id.* at 63a-67a.

On August 30, 1990, petitioner filed an Amended Complaint which eliminated any claim for injunctive relief for himself, because he no longer desired to play intercollegiate football or to return to Notre Dame, from which he had graduated that month. *See* Pet. App. 80a-91a.[2] The Amended Complaint contains two counts. The first continues to seek injunctive relief on behalf of the same class that petitioner sought to represent when he filed his original complaint, except that he no longer seeks injunctive relief for himself. The second claim, brought solely on behalf of petitioner, seeks treble damages under the Sherman Act, principally based on the loss of the

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[2] In addition to questions of personal preference and a need to get on with his life, petitioner's decision reflected the fact he was barred from returning to play football by NCAA Rule 14.2, which limits an athlete's intercollegiate eligibility to the five years after he begins his education. *See id.* at 4a-5a.

$16,000 a year athletic scholarship, as a result of being declared ineligible to play football again. Since he no longer sought reinstatement, petitioner voluntarily dismissed the action as to Notre Dame.

The Amended Complaint alleged that the no-draft and no-agent Rules restrain competition in three ways. First, the Rules restrain competition among NCAA members for student-athletes by foreclosing institutions from seeking to attract top prospects, and players from choosing institutions, based on the school's promise to give its athletes the opportunity to investigate their chances in professional sports without forfeiting their college eligibility if unsuccessful. *See id.* at 85a-86a, Amended Complaint ¶ 22(a).

Second, the Rules restrict the ability of college athletes, like Mr. Banks, who have unsuccessfully investigated opportunities outside the NCAA, to play for NCAA member universities that would otherwise be willing to "waive or change" the Rules. *See id.* at 86a, Amended Complaint ¶ 22(b). Absent these Rules, Notre Dame would have been free to allow petitioner to return, and it was only the group boycott enforced by the NCAA that prevented it from doing so.

Third, the Rules restrain competition between the NCAA and the NFL for those college athletes who are considered potential, but uncertain, prospects for professional sports. Under these Rules, student athletes who explore their marketability in professional sports are penalized by forfeiting all athletic scholarships and any further opportunity to exhibit their skills in the NCAA. *See id.*, Amended Complaint ¶ 22(c).

In lieu of answering, the NCAA moved to dismiss under Rule 12(b)(6). The motion had two parts, the first attacking the claim for injunctive relief, and the second arguing that both causes of action should be dismissed on the merits. As to the claim for injunctive relief, the NCAA first argued that, because petitioner was no longer seeking to play intercollegiate football, he lacked constitutional standing and was not entitled to injunctive

relief under the antitrust laws. *Id.* at 72a. In his opposition, petitioner pointed out that the class had standing to seek injunctive relief, under both the Constitution and the antitrust laws, and the real question was whether petitioner, who had properly alleged future injury and sought class certification in his original complaint, could be a representative for the class. This issue, petitioner argued, was not then before the court, but should be decided only on a motion for class certification, which had been deferred by agreement of the parties and with the approval of the court. *Id.*

The district court agreed. It noted that, in appropriate circumstances, a plaintiff who had a live claim at the time suit is filed, but whose own claim later became moot, may still serve as representative for a class of persons that still face the threat of injury. Accordingly, the district court concluded that, because the motion for class certification had been deferred, it was not appropriate to decide the issue at this stage of the proceedings. *See id.* at 74a-75a.[3]

In its second argument, the NCAA claimed that petitioner had not alleged an antitrust injury and that, in any event, its Rules were reasonable and should be upheld. *Id.* at 72a. Once again, the NCAA did not offer any evidence to substantiate its claim that the Rules were essential to preserve the procompetitive aspects of intercollegiate sports. Nevertheless, the district court granted the NCAA's motion under Rule 12(b)(6) and dismissed the complaint. The court relied on essentially the same grounds as those underlying its decision on the preliminary injunction: that "the NCAA has demonstrated significant procompetitive effects of its no draft rules" and petitioner did not allege "anticompetitive effects to overcome this positive impact and show an adverse market impact." *Id.* at 77a.

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[3] This Court reaffirmed the principles in the cases relied upon by the district court concerning the "relation back" doctrine for class actions in *County of Riverside v. McLaughlin*, 111 S.Ct. 1661, 1667 (1991).

4. Proceedings in the Court of Appeals.

The Seventh Circuit, in an opinion written by Judge Coffey and joined by Senior District Judge Grant of the Northern District of Indiana, affirmed the dismissal of the complaint in its entirety. The panel unanimously held that the claim for injunctive relief should have been dismissed for lack of standing, although it acknowledged that deciding the issue was not necessary in light of its disposition of the merits. *Id.* at 27a. It concluded that the decisions concerning the "relation back" doctrine for class actions were not applicable in this case because petitioner had not "been diligent in filing his claim shortly after discovering that he had failed to be selected for the draft or as a free agent." *Id.* at 9a. The Court of Appeals made this finding despite the absence of any factual record on this issue, and despite the district court's conclusion that it was inappropriate to address the issue because of the agreement to defer the class certification motion.

On the merits, the majority concluded that the complaint should be dismissed because "it failed to allege an anticompetitive effect in any identifiable market." *Id.* at 11a, 26a. Although the majority suggested that this was due to a pleading defect, it refused to identify the allegations that would have cured the purported defect, and indicated that additional allegations would not have altered its decision. *See id.* at 12a, 15a n.10, 22a-26a &n.20. Instead, the majority quoted from paragraph 22 of the Amended Complaint, which lays out three separate markets which the NCAA's Rules constrain. *Id.* at 13a-14a It declared that none of the constraints identified could be considered to be a restraint on trade because the NCAA Rules purport to "encourage the educational pursuits of student-athletes" and "prevent commercialism." *Id.* at 15a-16a. Moreover, the majority proclaimed: "None of the NCAA rules affecting college football eligibility restrain trade in the market for college football players" because the NCAA exists "to provide an opportunity for competition among amateur students pursuing a collegiate education." *Id.* at 17a. The majority categorically rejected the suggestion that NCAA schools could be analogized to

purchasers of labor in a market for college athletes as a "cynical view" that was inconsistent with the NCAA's professed goals. *Id.* at 20a-24a. It also spurned the idea that competition for players between the NCAA and NFL represents a cognizable market under the Sherman Act on the grounds that "the NCAA regulations preserve the bright line of demarcation between college and 'play for pay' football." *Id.* at 17a-18a, 19a-20a.

But the majority did not end there. Petitioner's principal assignment of error had been that the district court had made factual findings under the Rule of Reason on a motion to dismiss, with no discovery and no evidence in the record. *Id.* at 10a. Because the majority maintained that the district court's decision was based on the failure to allege an anticompetitive impact of the Rules, it dismissed petitioner's claim as "immaterial," but nonetheless observed that "[w]e are unconvinced that the record in this case requires further development in order to determine whether the NCAA rules have a procompetitive effect." *Id.* It then proceeded to conduct its own assessment under the Rule of Reason test. *See id.* at 16a-22a.

Despite the absence of any factual record, the majority made numerous findings, proclaiming, as if it had been proven, the following:

- The no-draft Rule "has no more impact on the market for college football players than other NCAA eligibility requirements such as grades, semester hours carried, or requiring a high school diploma." *Id.* at 17a
- The no-draft Rule is a "desirable and legitimate attempt 'to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives.'" *Id.* at 18a (quoting *Board of Regents*, 468 U.S. at 123 (White, J. dissenting)).
- The elimination of the no-draft and no-agent Rules "would turn amateur intercollegiate athletics into a sham because the focus of college football would shift from educating the student-athlete to creating a

> 'minor-league' farm system . . . for professional football in the NFL." *Id.* at 2a.

Based upon these and other findings, the majority declared that the no-agent and no-draft rules, and all other NCAA eligibility rules, "are vital . . . to preserve the amateur status of college athletics." *Id.* at 21a. As support for these findings, the majority opinion cited such extra-record sources as the sports pages of *USA Today*, the *Chicago Tribune*, and the *Milwaukee Journal*. *See id.* at 19a n.13, 21a n.15, 22a n.17.

Judge Flaum dissented on the merits. He reviewed the Amended Complaint and found that it properly alleges harm to competition in the market for college football players. Focusing on the no-draft Rule, Judge Flaum observed that it restrained competition among colleges in recruiting the most promising football players when they enter college:

> If the no-draft rule were scuttled, colleges that promised their athletes the opportunity to test the waters in the NFL draft before their eligibility expired, and return if things didn't work out, would be more attractive to athletes than colleges that declined to offer the same opportunity. The no-draft rule eliminates this potential element of competition among colleges, the purchasers of labor in the college football market. It categorically rules out a term of employment that players, the suppliers of labor in that market, would find advantageous.

Id. at 29a-30a.

He also observed that the no-draft Rule distorts the market for athletes leaving college in its effect on "'bubble players'" -- "athletes who are excellent competitors at the collegiate level, but for various reasons are considered less than certain NFL prospects." *Id.* at 30a-31a. The Rule discourages these players from testing the waters and "permits colleges to squeeze out of their players one or two more years of service." *Id.* at 31a. In light of these direct restraints on competition, Judge Flaum concluded

that "there can be no doubt that Banks has alleged an anticompetitive effect in a relevant market." *Id.* at 32a.

Judge Flaum also rejected the majority's decision to adjudicate the reasonableness of the challenged rules on a motion to dismiss, although he was careful to make clear that he was not deciding whether petitioner would prevail. He observed: "A lively debate [over the effect of the Rules] has arisen among those who have already considered the matter. I opt not to join the fray here, for I think it unwise to weigh pro- and anticompetitive effects under the rule of reason on a motion to dismiss." *Id.* at 36a (citations omitted).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS CONTRARY TO THE ANTITRUST DECISIONS OF THIS COURT AND PRESENTS IMPORTANT ISSUES CONCERNING THE APPLICATION OF THE ANTITRUST LAWS.[4]

Although the majority asserted that the dismissal of the complaint was based on a failure to plead properly, its reasoning leaves no doubt that the decision actually rested on the premise that student-athletes -- regardless of how their complaints are drafted -- cannot challenge any NCAA eligibility Rules under the antitrust laws. Indeed, on rehearing, the NCAA effectively conceded that the problem was not a defect in the pleading or inartful

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[4] Petitioner does not contend that the third question presented, relating to the propriety of the dismissal of the injunctive claim on mootness grounds, is itself worthy of review. However, because that ruling is entirely fact based, but without any basis in the record to sustain it, it is erroneous as a matter of law. Because it can be dealt with rather easily, along with the merits, review should be granted on it also, as the Court did in similar circumstances in *County of Riverside v. McLaughlin*, 111 S. Ct. at 1667.

drafting.[5] That concession is plainly correct, since even the majority recognized that the Amended Complaint alleges "a restraint on the market of college football players, college institutions who are members of the NCAA, and perhaps an NFL player recruitment market." Pet. App. 26a.[6]

The majority ruling can only be read as creating a special immunity for intercollegiate agreements directed at students, such as the NCAA Rules, and holding that, notwithstanding this Court's decision in *Board of Regents*, (1) "eligibility rules" that restrict the terms on which schools compete in recruiting student-athletes are immune from challenge under the antitrust laws; and (2) even if it such agreements were subject to antitrust scrutiny under the Rule of Reason, a defendant can prevail simply by asserting a procompetitive effect from its agreements, without having to prove it in court with admissible evidence.

Both propositions are in conflict with *Board of Regents* and other antitrust decisions. Moreover, both propositions have broad implications which are not limited to the NCAA or intercollegiate athletic competition. The immunity created by the decision below for intercollegiate agreements with "noncommercial" goals is equally applicable to agreements among colleges in other areas, such as scholarships, grants, and financial aid. Similarly, the Seventh Circuit's conclusion that the application of the Rule of Reason can properly be decided on a motion to dismiss by accepting a defendant's assertions that a restraint on trade enhances competition, without any

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[5] *See* Appellee's Answer to Appellant's Petition for Rehearing With Suggestion for Rehearing En Banc at 9-10.

[6] In its opinion on the preliminary injunction, the district court was even more explicit, acknowledging that the complaint alleged "a credible anticompetitive effect" because "[t]he 'no-draft' rule will deter better college football players from testing the waters of professional football" so that they "will remain in school and out of the NFL draft, enhancing the NCAA's already profitable product." Pet. App. 63a.

factual inquiry into the validity of the claim, extends to any antitrust challenge brought under that Rule, and not simply those challenging rules of the NCAA.

I. INTERCOLLEGIATE AGREEMENTS THAT RESTRICT ELIGIBILITY OF STUDENT-ATHLETES ARE NOT IMMUNE TO ANTITRUST CHALLENGE.

As this Court observed in *NCAA v. Board of Regents*, telecast rights are not the only area in which colleges compete. The schools of the NCAA also "compete against each other to attract . . . *fans and athletes*." *Id.* at 99 (emphasis added). But subsequent lower court decisions, including the decision here, have refused to apply the *Board of Regents* analysis to NCAA Rules restricting competition among schools for athletes. The first, and principal holding, of the majority decision in this case is that intercollegiate agreements in which NCAA schools collectively fix the terms on which they compete for student athletes are not subject to the antitrust laws at all. Under this view, agreements regarding such competition cannot be challenged under the Sherman Act on the grounds that the NCAA seeks to "prevent commercialism," there is no "market" for collegiate athletes, and the relationship between schools and student-athletes cannot be analogized to purchasers of labor. Pet. App. 15a-16a, 18a-21a.

This holding is fundamentally at odds with *Board of Regents* and other decisions of this Court in two respects. First, in *Board of Regents* this Court reaffirmed that "[t]here is no doubt that the sweeping language of § 1 [of the Sherman Act] applies to" nonprofit organizations and associations such as the NCAA. 468 U.S. at 100 n. 22. Indeed, this Court has consistently rejected efforts to create categorical exemptions from the Sherman Act for professional or nonprofit organizations because they serve noncommercial goals or for some other policy reason. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (rejecting contention that attorneys, as part of a "learned profession" are not subject to the antitrust laws); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 462-63 (1986)

(rejecting argument that dentists' rules on withholding x-rays could be justified by moral and ethical considerations of dental profession). The Seventh Circuit's decision, however, creates precisely the type of broad exception from antitrust laws that this Court has rejected by providing that intercollegiate agreements restraining competition among schools for student-athletes are immune from scrutiny under the Sherman Act simply because they purport to serve noncommercial interests.

The significance of this departure from this Court's prior decisions rejecting such immunity for organizations like the NCAA is underscored by this Court's observation in *Board of Regents* that the NCAA is organized to maximize revenues for its members, and that its agreements have a significant potential for anticompetitive effects. 468 U.S. at 100 n.22, 104-05.[7] Indeed, this Court has long recognized that agreements among competitors on the terms on which they will purchase services can have substantial anticompetitive effects, even when the restraints are indirect. *See, e.g., Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483-84 (1982) (alleged agreement among health insurers to restrain trade by denying health care benefits for psychologists states a claim under the Sherman Act). The Circuit Court's contrary view that NCAA agreements on student-eligibility are outside the scope of the antitrust laws rests, as Judge Flaum observed, on "an outmoded image of intercollegiate sports that no longer jibes with reality." Pet. App. 38a. The no-draft and no-agent Rules are, in antitrust parlance, classic examples of a group boycott or concerted refusal to deal that are ordinarily condemned as *per se* violations of the Sherman Act. *See, e.g. Radiant Burners v. Peoples Gas Light and*

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[7] *See also* Goldman, *Sports and Antitrust: Should College Athletes Be Paid To Play?*, 65 Notre Dame L.R. 206, 209-212 (1990) (NCAA operates as a cartel in which rules restrict competition for athletes to the benefit of schools, coaches, and recruiters, and cause misallocation of resources that harms consumer welfare); Koch, *The Economic Realities of Amateur Sports Organization*, 61 Ind. L.J. 9 (1985) (describing NCAA as an economic cartel).

Coke Co., 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). As with the NCAA telecast plan at issue in the *Board of Regents* case, the anticompetitive consequences of such horizonal agreements "are apparent. Individual competitors lose their freedom to compete." 468 U.S. at 468. But the Circuit Court refused to apply these principles in the decision below and, instead, held that members of the NCAA are permitted to enter into unreasonable restraints on competition with complete impunity -- as long as they are directed at student-athlete eligibility.

Secondly, the Seventh Circuit's decision is contrary to *Board of Regents* because it rests on a misreading of a portion of that decision in which this Court stated that "[i]t is reasonable to assume that *most* of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive." 468 U.S. at 117 (emphasis added). The Circuit Court transformed this qualified statement into a conclusion that: "*None* of the NCAA rules affecting college football eligibility restrain trade in the market for college players." Pet. App. 17a (emphasis added). Other decisions have given the same broad reading to the *Board of Regents* opinion's discussion of eligibility rules. In *Gaines v. NCAA*, 746 F. Supp. 738, 743-44 (M.D. Tenn. 1990), the court quoted that same passage from the *Board of Regents* opinion to support its conclusion that NCAA eligibility rules are not subject to scrutiny under Section 2 of the Sherman Act. Similarly, the Fifth Circuit, while it has not gone as far as the Seventh Circuit majority, has also interpreted the same passage from *Board of Regents* as having "strongly indicated" that eligibility rules are to be upheld against all antitrust challenges. *See McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988) (rejecting challenge to restrictions on athlete compensation on motion to dismiss).

These decisions plainly misread *Board of Regents*. This Court's observation that *most* NCAA eligibility rules would be upheld as reasonable and necessary implicitly acknowledged that *some* eligibility rules may run afoul of

the antitrust laws when tested under the Rule of Reason. Indeed, at the heart of the *Board of Regents* holding is the recognition that the NCAA has gone beyond adopting rules required to preserve amateurism and, in the name of "amateurism," has imposed additional restrictions that unreasonably restrain trade in violation of the Sherman Act. *See Board of Regents*, 468 U.S. at 119 (while NCAA imposes a variety of restrictions that are designed to preserve amateurism, its television plan is not even arguably tailored to serve this purpose). For this reason, particular rules, including "eligibility rules," must be scrutinized under the Rule of Reason to determine whether they are genuinely necessary to promote competition, or only serve the NCAA's interests in restricting competition. Some eligibility rules, including the no-draft and no-agent Rules, are more closely (if not exclusively) related to the commercial and competitive interests of NCAA universities than to defining collegiate athletics as a unique product for consumers.[8] But under the Seventh Circuit's decision here, *every* rule relating to eligibility is wholly outside the scope of the antitrust laws, no matter how harmful it is to competition. This conclusion cannot be squared with this Court's decision in *Board of Regents* and other cases, which make clear that compacts among competitors, regardless of how they are labelled, are subject to scrutiny to under the Sherman Act.

In addition to being contrary to *Board of Regents*, the Seventh Circuit's decision also warrants review because its reasoning potentially immunizes from antitrust scrutiny a myriad of other intercollegiate agreements with serious anticompetitive effects. In the opinion below, the Seventh Circuit adopted the view that noneconomic values pursued by educational institutions like the NCAA presumptively

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[8] *See also* Stiglitz, *NCAA-Based Agent Regulation: Who Are We Protecting?*, 67 N. Dak. L. Rev. 215, 217-18 (1991) (arguing that many NCAA eligibility rules are not concerned with amateurism but "with how much it would cost [NCAA] institutions if they had to competitively reward athletes for their skills," and that the rules go farther than necessary to protect amateurism).

outweigh, or justify disregarding, the anticompetitive effects of intercollegiate agreements -- a premise that was rejected by the majority in *Board of Regents*. *Compare* 468 U.S. at 104 (restraint must be judged based upon its impact on competition), *with* 468 U.S. 134-35 (White, J., dissenting) (noneconomic educational values should be considered); *see also National Society of Professional Engineers v. United States*, 435 U.S. 679, 690 & n.16 (1978) (inquiry under Sherman Act "is confined to a consideration of competitive conditions"). This reasoning is not limited to the NCAA, or even to intercollegiate athletics. Numerous intercollegiate associations and agreements exist in which schools develop rules and understandings concerning the manner in which colleges and universities compete in areas such as scholarships, financial aid, and attracting students. Like the NCAA, these associations and their agreements purport to exist for the purpose of promoting education and preventing commercialism -- but they also can have serious anticompetitive effects on students. Thus, the Seventh Circuit's holding that student-athletes cannot challenge NCAA Rules could also exempt from antitrust scrutiny many other intercollegiate agreements that purport to be motivated by noncommercial concerns.

A case-in-point is *United States v. Brown University*, 805 F. Supp. 288 (E.D. Pa. 1992), *appeal pend'ng*, No. 92-1911 (3rd Cir.), in which the Department of Justice charged that an agreement among universities that included standards by which they will determine financial need violated the antitrust laws. The district court rejected the defendant university's claim that, because the financial aid agreement was motivated by charitable and educational -- rather than "commercial" motives -- the agreement was not subject to the antitrust laws. 805 F. Supp. at 296-98. But under Seventh Circuit's reasoning in this case, intercollegiate agreements on eligibility for financial aid would appear to be just as immune from challenge by the students as agreements on eligibility for college athletes. Indeed, the need for antitrust scrutiny is, if anything, even greater with respect to agreements like those at issue here,

in which the motives of the universities participating in such agreements are more obviously commercial, and the profits potentially large.

The immunity for such intercollegiate agreements created by the Seventh Circuit is particularly troublesome because it denies the protection of the antitrust laws to those who have no other effective means of challenging the anticompetitive aspects of agreements that directly affect them. Under *Board of Regents*, NCAA members have the right to challenge the NCAA Rules under the antitrust laws, even though they participate in the adoption of the Rules and may reap their benefits. In contrast, the Seventh Circuit's decision denies this right to student-athletes who have no role in formulating the Rules.

In the proceedings below, the NCAA argued it was proper to deny student-athletes the right to challenge NCAA agreements because the injury imposed on them by rules restricting the terms on which schools compete for their services is not the type of "antitrust injury" required for standing under the Sherman Act. This claim is clearly inconsistent with the decisions of this Court holding that agreements among competitors concerning the terms upon which they will compete for labor and other services give rise to claims under the antitrust laws. In the case most closely analogous to this action, *Radovich v. National Football League*, 352 U.S. 445 (1957), a professional football player brought an antitrust action alleging that, in an effort to discourage players from moving from the NFL to competing leagues, the NFL teams agreed to use a standard player contract which prohibited a player from switching to another club. *Id.* at 448-49. This Court held that the complaint alleged an unreasonable restraint, with the requisite antitrust injury, and that the player was entitled to an opportunity to prove his charges at trial. *Id.* at 453-54.

Since *Radovich*, numerous decisions have affirmed that "[t]he purposes of the antitrust laws are served when employers are prevented from tampering with the employment market" by controlling the terms on which they will compete for purchasing services. Pet. App. 33a;

see, e.g. Nichols v. Spencer International Press, Inc., 371 F.2d 332, 334-36 (7th Cir. 1967).[9] As the leading treatise on antitrust law puts it in describing whether employees have the antitrust injury required to challenge agreements among employers to control their terms of employment:

> It would be perverse indeed to hold that the very object of the law's solicitude and the persons most directly concerned -- perhaps the only persons concerned -- could not challenge the restraint. . . . The standing of such plaintiffs is undoubted and rarely challenged.

II P. Areeda and D. Turner, *Antitrust Law* ¶ 338c, at 199-200 (1978). The decision below reflects just such a "perverse" holding by making NCAA agreements restricting competition for student-athletes immune from challenges by the very individuals whose opportunities the agreements are designed to restrict.[10]

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[9] These decisions have included rulings that players may challenge agreements designed to restrict competition between amateur and professional sports as contrary to the antitrust laws. *See Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1061-67 (C.D. Cal. 1971) (NBA rule prohibiting use of players who have been out of high school less than four years is concerted refusal to deal which violates antitrust laws); *Linesman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1320 (D. Conn. 1977) (hockey league rule against hiring players until they reach the age of twenty is a group boycott in illegal restraint of trade under the Sherman Act); *Boris v. USFL*, 1984-1 Trade Cas. (CCH) ¶ 66,012 (C.D. Cal. 1984) (granting preliminary injunction against USFL prohibition on recruiting intercollegiate athletes with remaining eligibility).

[10] The decisions the NCAA relied upon below to support its claim that the injury identified in petitioner's complaint is not an "antitrust injury" are inapposite. Its principal authority below, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), dealt with the threat of lost profits due to increased competition following a merger and held that such a claim does not state an antitrust injury. A second decision cited by the NCAA below, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), stands only for the proposition

(continued...)

The majority opinion clearly precludes students from challenging any of the NCAA's eligibility rules even if, for example, they required students to pay back all of their scholarships if they became professional athletes before their eligibility expired. Its broad statements endorsing the NCAA's Rules, however, also appears to preclude an NCAA member school from going to court if the NCAA declared one of its star players to be ineligible based on a Rule that the school alleged violated the antitrust laws. Moreover, it also appears to foreclose an antitrust action by the NFL or, more likely, a new league, challenging the NCAA's eligibility Rules on the ground that they prevented it from competing for athletes with NCAA member schools. If such actions are not within the antitrust laws, it would have to be because of some unarticulated difference between the agreement that was successfully challenged in *Board of Regents* and those agreements labelled "eligibility rules," yet none is apparent under the antitrust laws. In the alternative, the Court of Appeals may have intended to preclude only student-athletes from challenging eligibility rules under the antitrust laws. That approach would limit the reach of the opinion, but it would create an exception to the antitrust laws for which there is no basis in the statute or any other authority. In either event, the reach of the opinion, as it affects others, is a further reason for granting review.

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[10](...continued)
that a competitor is not entitled to challenge non-predatory pricing arrangements between a producer and its retailers under the antitrust laws.

II. THE RULE OF REASON CANNOT PROPERLY BE APPLIED TO ANALYZE AN AGREEMENT AMONG COMPETITORS WHERE THERE HAS BEEN NO DEVELOPMENT OF THE FACTS CONCERNING THE AGREEMENT'S COMPETITIVE EFFECTS.

The Seventh Circuit's dismissal of the claims in this case without any evidence on the competitive effects also raises an important issue regarding the proper application of the Rule of Reason. Petitioner's primary contention before the Circuit Court was that the district court, having acknowledged that the allegations of the complaint "posited a credible anticompetitive effect" to the NCAA Rules, Pet. App. 63a, acted improperly in declaring that the net impact of the Rules was procompetitive without any evidence on the Rules' actual operation. *Id.* at 10a. In affirming the entry of judgment, the Seventh Circuit not only rejected this objection, but conducted its own Rule of Reason analysis in which it made what are, in essence, factual findings that the NCAA Rules are essential to enhance competition, despite the absence of any evidence to support such a conclusion. *See supra* at 11-12. But neither court had any facts before it from which such a conclusion could be reached. The question was presented to the district court on a motion to dismiss, and the NCAA presented *no* evidence to support its claim that the Rules fostered competition -- much less to establish that they were essential to maintaining the identity of intercollegiate athletics as a unique product in the marketplace. *Board of Regents*, 468 U.S. at 114-15.[11]

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[11] As Judge Flaum observed in his dissent, there is a substantial debate over the credibility of the NCAA's claim that the no-draft and no-agent Rules are essential to defining college football as a distinct and viable product. *See* Pet. App. 36a. The attributes that identify college sports as a unique product to consumers are the fact that the athletes attend college and are not compensated in the same way as professional athletes. The no-draft and no-agent Rules do little, if anything, to preserve this identity. Indeed, the substantial contacts

(continued...)

Determining the pro- and anticompetitive effects in this manner on a motion to dismiss was plainly contrary to the general requirement that all allegations must be taken as true on a motion to dismiss. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). More particularly, it is contrary to this Court's decisions concerning application of the Rule of Reason. The balancing of economic effects required under the Rule of Reason "necessarily involves an inquiry into the actual effect" of the challenged agreement. *Jefferson Paris Hospital District No. 2 v. Hyde*, 466 U.S. 2, 29 (1984). Such inquiry cannot be performed on a motion to dismiss, where there has been no factual development concerning such actual effects. In *Board of Regents*, the determination of whether the restraint on trade was reasonable was made after a "full trial," 468 U.S. at 95, and at numerous places this Court noted that its analysis was based on the fact that "evidence" supported the findings of the district court or that there was no evidence to support the claims of procompetitive effects urged by the NCAA. *Id.* at 114, 115, 116, and 119. Similarly, in *National Society of Professional Engineers*, 435 U.S. at 685, the Court observed that Rule of Reason cases involve "agreements whose competitive effect can only be evaluated by analyzing the facts pertaining to the business, the history of the restraint, and the reasons why it was imposed." *Id.* at 692; *see also Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977) (under the Rule of Reason "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition"). Most recently, in *FTC v. Indiana Federation of Dentists*, the Court described that

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[11](...continued)
that the NCAA allows between student-athletes and professional sports seriously undermine its unsupported claim that these particular Rules are somehow essential to preserving amateurism. *See* Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 Harv. L. Rev. 1301, 1308-12 (1992) (arguing that NCAA rules are invalid under Rule of Reason tests); Lock, *Unreasonable NCAA Eligibility Rules*, 20 Cap. Univ. L. Rev. 643, 650-52, 657-59 (1991) (same).

Rule of Reason case as involving "lengthy proceedings including a full evidentiary hearing." 476 U.S. at 451. In concluding that the restriction was unreasonable, the Court found that the FTC had properly rejected it because respondents had not introduced "sufficient evidence" to support it. *Id.* at 464.

The Seventh Circuit's contrary conclusion -- that the balancing required under Rule of Reason analysis can be conducted on a motion to dismiss -- presents a significant conflict with this Court's holding that antitrust claims should be resolved based on fact, not supposition. Just last Term in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072, 2082 (1992), this Court stressed that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." Antitrust claims should not be resolved on theory, the Court said, but by "focusing on the 'particular facts disclosed by the record.'" *Id.* (quoting *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 579 (1925)). In *Kodak*, the Court upheld a decision reversing and remanding a grant of a motion for summary judgment in an antitrust case for further evidentiary proceedings, and even the dissenting Justices indicated that, if the claim had been brought under the Rule of Reason rather than as a *per se* challenge, further proceedings would have been necessary to properly determine the facts. *Id.* at 2092, and *id.* at 2101 (Scalia, J., dissenting). The Seventh Circuit's decision in this Rule of Reason case significantly undermines this principle, and encourages resolution of antitrust cases based on the presumptions of a particular court, rather than the actual effects of the restraint in the marketplace.

Indeed, the Circuit Court's decision seriously limits the utility and credibility of the Rule of Reason test by making its outcome dependent on the lower court's subjective assessment of the purpose and effect of agreements among competitors. In holding that the NCAA's Rules enhance competition as a matter of law, the majority repeatedly relied upon the avowed purposes of the NCAA's eligibility Rules as sufficient to demonstrate that these agreements

among competitors are not anticompetitive. *See, e.g.*, Pet. App. 16a, 19a-20a (citing NCAA statements of purpose and policy behind its rules as evidence of their impact). Such reliance on proclaimed purposes, rather than facts, is inconsistent with this Court's admonition that the NCAA's "good motives will not validate an otherwise anticompetitive practice." *Board of Regents*, 468 U.S. at 101 n.23. *Board of Regents* and other decisions of this Court make clear that, under the Rule of Reason, a defendant must demonstrate the challenged restraint does, in fact, benefit competition, and that its benefits cannot be achieved by a less restrictive means. *Id.* at 104, 114-15; *see also* Areeda, *The Rule of Reason -- A Catechism on Competition*, 55 Antitrust L. Rev. 571, 573, 578-79 (1986) (Rule of Reason calls for objective assessment of effects); *Association of Intercollegiate Athletics for Women v. NCAA*, 735 F. 2d 577, 583 & n.6 (D.C. Cir. 1984) ("competitive effect, not intent, determines civil liability"). The Seventh Circuit's resolution of this Rule of Reason case on a motion to dismiss, based on the defendant's unsubstantiated legal arguments concerning the purpose of its restraints, short-circuits the proper analysis and undermines the effectiveness of the antitrust laws as a protection against conspiracies to restrain trade.

CONCLUSION

For the reasons cited above, the petition should be granted.

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March 10, 1993

92-1466

No. 92-___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRAXSTON LEE BANKS,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Decision of the United States Court of Appeals for the Seventh Circuit (Oct. 13, 1992) 1a

Memorandum and Order of the United States District Court for the Northern District of Indiana denying plaintiffs' motion for a preliminary injunction (Aug. 17, 1990) 41a

Memorandum and Order of the United States District Court for the Northern District of Indiana granting defendant's motion to dismiss (Feb. 20, 1991) 69a

Order of the United States Court of Appeals for the Seventh Circuit denying petition for rehearing (Dec. 10, 1992).. . . . . 79a

Amended Complaint (filed Aug. 30, 1990) 80a

In the
United States Court of Appeals
For the Seventh Circuit

No. 91-1666
BRAXSTON L. BANKS,

Plaintiff-Appellant,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 90 C 394-**Robert L. Miller, Jr.**, *Judge*.

Argued December 6, 1991--Decided October 13,1992

Before COFFEY and FLAUM, *Circuit Judges,* and GRANT, *Senior District Judge.*[*]

COFFEY, *Circuit Judge.* Braxston Lee Banks appeals the district court's dismissal of his claim that the National Collegiate Athletic Association ("NCAA") rules withdrawing athletes' eligibility to participate in collegiate sports in the event the athlete chooses to enter a professional draft

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[*] The Honorable Robert A. Grant, Senior Judge for the Northern District of Indiana, is sitting by designation.

or engages an agent to help him secure a position with a professional team are an illegal restraint on trade or commerce in violation of 15 U.S.C. § 1. We affirm the judgment of the district court holding that Banks failed to state a claim upon which relief can be granted.

I. FACTS

Banks entered the University of Notre Dame on a full football scholarship in September of 1986. As a freshman Banks started in four or five games and in fact played in all eleven contests. In the first game of his sophomore year, Banks injured his knee and, as a result of his injury, played in only seven games -- he started in four of them. Again in his junior year, allegedly because of the knee injury, Banks played in only six games but again started in four. Banks chose to sit out his senior year (1989) because, as he stated, "of my desire to be sure that my knee was fully recovered before I played again." Having completed three years of college eligibility, Banks was eligible to enter the National Football League ("NFL") selection process or "draft" in the spring of 1990. Banks decided to enter the 1990 NFL draft[1] after representatives of two scouting organizations employed by the NFL teams informed him that he would have been invited to the regular NFL scouting try-outs if he had completed his collegiate eligibility. His decision was allegedly based partially on a fear that playing another season of college football might expose him to further injury and thus prevent him from entering the pros, as well as the belief that

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[1] Before a player with remaining intercollegiate eligibility enters the draft, he must sign a form stating that "I hereby irrevocably renounce any and all remaining college eligibility I may have. I wish to be eligible for the NFL draft scheduled for April 22-23, 1990." The NCAA agrees with Banks that this statement of waiver did not prevent him from playing football at Notre Dame in the fall of 1990.

he could anticipate being drafted because a former teammate, who was placed in the starting lineup at Notre Dame after Banks suffered a knee injury, was expected to be drafted early. After the news of Banks' entrance into the draft became public, representatives of virtually every NFL team visited Notre Dame and put him through athletic efficiency drills to test his skills. In addition, Banks participated in an NFL tryout in Indianapolis, Indiana for college players who had entered the draft before completing college eligibility. Banks apparently performed below par at the tryouts in Indianapolis, and as a result failed to be selected in the draft or as a free agent.

Under the NCAA rules, an athlete is eligible to play four seasons of an intercollegiate sport within five years of commencing his college education.[2] As a result of sitting out his senior year of eligibility, Banks had one year of intercollegiate eligibility remaining when he graduated in August of 1990.[3] Banks concluded that his failure to be picked in the NFL draft was based on the respective teams' fears that his injury made him suspect because of his previous knee injury; rather than the teams' evaluation that his playing skills did not measure up to the professional level of the NFL. In spite of the fact that he was exposing himself to further injury, he decided that the only way for him to demonstrate his ability to compete on

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[2] An athlete's eligibility to participate in NCAA sanctioned sports programs is also conditioned upon his or her meeting minimum academic requirements, i.e., the athlete's grade point average and number of semester credits. See 1992-93 NCAA Division I Operating Manual § 14.3.1.1(a),(b) (Bylaw requiring high school graduates to have maintained a 2.0 high school grade point average and achieved a combined S.A.T. score of 700 (or an A.C.T. composite score of 15) to participate in intercollegiate athletics.

[3] Banks completed the requirements for his B.A. in English during the summer, 1990 term.

the professional level was to return to Notre Dame for graduate courses and re-enter its intercollegiate football program during his final year of eligibility. Unfortunately for Banks, two NCAA eligibility rules stood in his way. Rule 12.2.4.2, the "no-draft" rule, provides that "[a]n individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport . . . ." Rule 12.3.1, the "no-agent" rule, states: "An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport." Since Banks participated in the draft try-outs and agreed to be represented by an agent subsequent to signing up for the draft, either of the two rules (NCAA Rule 12.2.4.2 or Rule 12.3.1) was sufficient to bar him from participating in his final year of eligibility at Notre Dame. The Notre Dame football coaches allegedly wanted Banks to play in the 1990 season, but according to Banks, the school refused to request the NCAA to reinstate Banks' eligibility because no college had ever appealed to the NCAA to restore eligibility of a player who entered the NFL draft. The NCAA declined to consider Banks' personal request for reinstatement, as the bylaws provide only for member colleges to petition for restoration of an athlete's eligibility.

With Notre Dame's football season rapidly approaching (first practice August 17, 1990), Banks filed his complaint in the United States District Court for the Northern District of Indiana in South Bend on August 9, 1990. In his first cause of action Banks requested a preliminary injunction against Notre Dame and the NCAA to prevent the enforcement of the no-draft and no-agent rules; in his second cause of action, Banks sought an injunction on behalf of himself and a class of players similarly situated restraining the NCAA from enforcing the

rules. The district court denied Banks' request for a preliminary injunction after a hearing. The court held that Banks had "not demonstrated a reasonable likelihood of success on his claim that the NCAA's regulations restrain trade in violation of § 1 of the Sherman Act." After the denial of his request for a preliminary injunction that would have allowed him to play during the 1990 season, Banks' hopes of reentering the Notre Dame football program evaporated because of NCAA Rule 14.2, which limits an athlete's intercollegiate eligibility to five calendar years from the date he registers as a full-time student.[4] Thereafter, Banks amended his complaint on August 30, 1990 and withdrew his request for a "preliminary injunction" and made two claims: (1) requesting that the NCAA be permanently enjoined from enforcing Rules 12.2.4 and 12.3 on behalf of the plaintiff's class (Amended Complaint, ¶¶ 30-33), and (2) treble damages from the NCAA for "the loss of his grant-in-aid worth approximately $16,000 for another year, the value of the extra year of education, and the value of another year of football eligibility at Notre Dame." (Amended Complaint, ¶ 36). Pursuant to Federal Rule of Civil Procedure 12(b)(6), the NCAA moved to dismiss Banks' complaint for failure to state a claim (the complaint stated two claims) upon which relief can be granted. In granting the NCAA's motion, the district court stated with respect to Banks' individual claim for treble damages:

> "Mr. Banks argues that he has asserted a cognizable injury under the antitrust laws in the second cause of action of his amended complaint. He contends that the impact of the NCAA's rules cannot be resolved on a motion to dismiss since disposition of that issue is fact-sensitive. He suggests that the NCAA rules violate

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[4] Since Banks entered Notre Dame as a full-time student in the fall of 1986, the 1990 season was the last year he would have been eligible to compete under Rule 14.2.

> the antitrust laws by restricting opportunities in the labor market for collegiate football players. Mr. Banks further suggests that the rules effect a group boycott on the part of the NCAA and the NFL teams over collegiate football players as consumers in the labor market. *Mr. Banks does not suggest what anti-competitive effects result from either restraints in the football labor market or the group boycott;* nor does he challenge the purported pro-competitive impact of the NCAA's no draft rules."

Mem. Op. at 5-6 (Feb. 20, 1991) (emphasis added). The court held that:

> "Mr. Banks' amended complaint fails to allege facts establishing the NCAA's violation of the antitrust laws. As discussed in the August 17 order, the NCAA has demonstrated significant pro-competitive effects of its no draft rules. Mr. Banks has alleged no anti-competitive effects to overcome this positive impact and show an adverse market impact upon either collegiate players or NCAA member institutions. As discussed in the August order, the rules affect neither the player's ability to receive financing for their education nor the school's opportunity to compete for athletes. While Mr. Banks claims that the NCAA rules in questions accomplish a group boycott by way of restricting the football labor market, *he ties those allegations to no competitive impact on any identifiable market.* Mr. Banks has no antitrust injury that can be gleamed [sic] from the amended complaint."

Id. at 10-11 (emphasis added).

II. ISSUES

We will address the following issues in this appeal: 1) whether Banks has standing to act as a class representative

for the purpose of seeking to enjoin the NCAA's enforcement of its no-draft and no-agent rules; 2) whether the district court erred in dismissing this antitrust claim under Rule 12(b)(6) for failure to state a claim upon which relief can be granted; and 3) whether the plaintiff stated a valid antitrust claim in his second cause of action.

III. STANDING

The NCAA asserts that since Banks' claim on behalf of the class for injunctive relief is moot as to Banks,[5] he lacks the standing necessary to create a rase or controversy sufficient to invoke the jurisdiction of a federal court pursuant to Article III of the United States Constitution.[6] "One commentator has defined mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' " *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S. Ct. 1202, 1209 (1980) (citation omitted). A case becomes moot when the controversy between the parties is no longer live, or one of the parties lacks a personal stake in the outcome of the suit. *See id.* at 396, 100 S. Ct. at 1208. "The personal stake requirement relates to the first purpose of the case-or-controversy doctrine — limiting judicial power to disputes capable of judicial resolution." *Id.* Banks' ineligibility to participate in collegiate football because of

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[5] Banks does not challenge the fact that his class-action claim was moot as to him personally when he filed his amended complaint, for he abandoned his quest to have his eligibility reinstated at that time.

[6] The NCAA additionally argues that Banks is without antitrust standing to seek an injunction, since his alleged harm is in the past, and injunctive relief is granted to avoid future antitrust injuries. In view of our disposition of the constitutional standing issue, it is unnecessary to address whether Banks had antitrust standing.

NCAA Rule 14.2 prevents him from having a personal stake in whether the NCAA continues to enforce its no-draft and no-agent rules. Nonetheless, the mootness requirements are less stringent in the class action context, for mootness "can be avoided through certification of a class prior to expiration of the named plaintiff's personal claim." *Id.* at 398, 100 S. Ct. at 1210. Or, if the class is not certified before the named plaintiff loses his or her personal stake,

> "[w]hen the claim on the merits is 'capable of repetition, yet evading review,' the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation . . . but only where the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may rise again with respect to *that plaintiff* . . . ."

Id. at 398, 100 S. Ct. at 1209 (emphasis added). The Supreme Court limited its holding in *Geraghty* "to the appeal of the denial of class certification motion. A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified." Id. at 404, 100 S. Ct. at 1213. The district court never ruled on Banks' request for class certification because the parties, with the approval of the court, agreed to defer consideration of the class certification issue until after the court's ruling on the NCAA's motion to dismiss. Thus, under the express terms of *Geraghty*, Banks may not seek relief for the class because the claim cannot be considered viable as Banks is no longer a member of the class, and there is no class certification ruling to appeal.

Banks argues that he may nevertheless represent the class, since he had a live claim for injunctive relief when the case was initially filed, and the claim "is of the kind that is unlikely to be able to be certified before it becomes

moot." We recognize that "'[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.' " *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1667 (1991) (quoting *Geraghty*, 445 U.S. at 399, 100 S. Ct. at 1210). But we do not believe Banks' alleged legal injury was "so inherently transitory" as to prevent a district court from ruling on a request for class certification prior to expiration of the personal interest. Banks entered but was not selected in the NFL draft held on April 22-23, 1990, and thus had nearly 120 days between the NFL draft on April 23, 1990, and the start of Notre Dame's football practice on August 17, 1990 to bring his claim for injunctive relief. In *Trotter v. Klincar*, 748 F.2d 1177, 1184-85 (7th Cir. 1984), we rejected a claim that seventy days provided insufficient time to obtain a ruling on a motion for class certification. In this case, it was Banks' decision to wait until only eight days before his claim for injunctive relief became moot that made his claim transitory. Had Banks been diligent in filing his claim shortly after discovering that he had failed to be selected for the draft or as a free agent, and still be unable to obtain class certification, he might have been able to make an argument for the class that he had standing for the purpose of pursuing a ruling on class certification even though his own individual claim had become moot. But under the circumstances of this case, where the district court dismissed the claim prior to ruling on Banks' request for class certification for the claim of injunctive relief, we are without jurisdiction to consider the merits of Banks' first cause of action. *See Geraghty*, 445 U.S. at 404, 100 S. Ct. at 1213. The district court should have dismissed Banks' class action claim for injunctive relief as moot.

IV. RULE 12(b)(6) DISMISSAL OF A RULE-OF-REASON CASE

Banks' primary contention on appeal is that because the record is not thoroughly developed, it was inappropriate for the district court to decide that the NCAA no-draft and no-agent rules were pro-competitive in ruling on a Rule 12(b)(6) motion to dismiss.[7] Banks asserts that "[w]ithout any evidence, the district court agreed with the NCAA that its no-draft and no-agent Rules were reasonable and dismissed the complaint under Rule 12(b)(6) for failure to state a claim." We are unconvinced that the record in this case requires further development in order to determine whether the NCAA rules have a pro-competitive effect, but it is immaterial to evaluation Banks' argument that the district court improperly decided that the rules were reasonable. The district court decided the case not on the basis of the relative anti-competitive effect of the rules versus the pro-competitive impact, but on the ground of Banks' absolute failure to allege an anti-competitive effect: "Mr. Banks does not suggest what anti-competitive effect result from either restraints in the football labor market or the group boycott; nor does he challenge the purported pro-competitive impact of the NCAA's no draft rules." The court went on to hold that "[w]hile Mr. Banks claims that the NCAA rules in question accomplish a group boycott by way of restriction the football labor market, *he ties those allegations to no competitive impact on any identifiable market.* Mr. Banks has no antitrust injury that can be gleamed [sic] from the amended complaint." (Emphasis added.) Since the district judge's decision was based on Banks' failure to allege an anti-competitive effect on an identifiable market, the argument that the court

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[7] The mootness of Banks' first cause of action does not affect his claim under the second cause of action for damages from his alleged injury.

improperly determined that the rules were reasonable on a motion to dismiss is without merit.

V. THE VALIDITY OF THE ANTITRUST CLAIM

The district court dismissed Banks' claim because he failed to allege that the NCAA rules had an anti-competitive impact on any identifiable market. Banks chose to appeal the judgment of the court rather than request leave to amend and reinstate his complaint. On appeal, Banks ignores the holding of the district court and asserts that the court found an anti-competitive impact on a relevant market. Referring to the trial court's holding, Banks states:

> "In ruling on plaintiff's motion for a preliminary injunction, the district court found that plaintiff had standing to raise his antitrust claim and that he had identified a relevant market and shown an anticompetitive restraint on that market ('no-draft rule will deter better college football players from testing the waters of professional football' so that they 'will remain in school and out of the NFL draft, enhancing the NCAA's already profitable product.') Neyertheless, it ended its subsequent opinion dismissing the case with a statement that plaintiff 'has no antitrust injury that can be gleamed [sic] from the amended complaint' — but with no elaboration for this conclusion. Accordingly, our response is based on the argument raised by the NCAA below."

The district court's conclusion that Banks "has no antitrust injury" was obviously based upon its holding that Banks failed to allege an anti-competitive impact on a relevant market. We confess that we are somewhat perplexed as to how Banks expects to get a reversal of the

district court's judgment without assigning error to its holding.[8]

The dissent claims, on the other hand, that Banks' complaint did allege an anti-competitive impact on an identifiable market. Dissent at 27 n*. We disagree, but we do not dispute the fact that the plaintiff could have alleged an anti-competitive impact. However, this court is not able to review what Banks could have alleged, but is called upon to review only what he actually alleged. Our review of Banks' argument shows that the plaintiff cited only exampies of anti-trust law violations (group boycotts, price fixing, control of output, refusal to deal) but failed to delineate much less explain which, if any, of these restraints of trade apply to the NCAA rules at issue.[9]

This court has previously addressed the requirement of alleging anti-competitive effects on a market in order to make out a claim for a violation of the Sherman Act.

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[8] Although we could hold that Banks' failure to argue that the district court erred in holding that his complaint did not allege an anticompetitive impact on a discernible market waived any such argument, we choose to review the complaint. Alternatively, we review the complaint because the NCAA for some reason failed to raise the defense of waiver.

[9] Contrary to the dissent's view, Banks was not "compelled to address the arguments presented in the NCAA's brief . . ." to allege an anti-competitive effect. Dissent at 27n*. Banks was required to allege and explain how the challenged NCAA rules have an anti-competitive impact on *the markets he describes as (1) NCAA member institutions and (2) NCAA football players who enter the draft and/or employ an agent.* Absent the plaintiff's explaining how the no-draft and no-agent NCAA rules are "classic" examples of restraints of trade in his amended complaint (¶22(b)), we agree with the trial court that Banks has failed to sufficiently allege an anti-competitive impact upon an identifiable market to survive the 12(b)(6) motion.

> "The fundamental requirement at issue in this dispute is that of *a sufficient allegation of anticompetitive effects that would result or have resulted from the defendants' actions; the absence of such allegations is ordinarily fatal to the existence of a cause of action.* The purpose of the Sherman Act is to rectify the injury to consumers caused by diminished competition; it is for this reason that Congress provided a treble damage recovery for private parties willing to initiate an enforcement action. Thus, the plaintiff must allege, not only an injury to himself, but an injury to the market as well. . . .
>
> "It is only when the plaintiff adequately states a *per se* violation of § 1 of the Sherman Act that an allegation of anticompetitive effects is not required."

Car Carriers, Inc. v. Ford Motor Company, 745 F.2d 1101, 1107-08 (7th Cir. 1984) (footnote and citations omitted) (emphasis added). Under the Supreme Court's ruling in *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85, 104 S. Ct. 2948 (1984), allegations that the NCAA rules restrain trade or commerce may not be viewed as per se violations of the Sherman Act, but must be addressed under the "Rule of Reason." Thus, in order for Banks' complaint to state a claim upon which relief can be granted, it must allege anti-competitive effects on a discernible market. *See Hennessy Industries, Inc. v. FMC Corp.*, 779 F.2d 402, 404 (7th Cir. 1985).

Banks' complaint alleged that the NCAA no-draft and no-agent rules restrained trade or commerce in three ways:

> "(a) First, there is the restraint imposed by the NCAA on all of its member institutions that restricts them from offering a player such as Banks, who enters the draft and/or retains an agent, an opportunity to

play college football again. The relevant market on which that restraint is imposed is all those players who wish to play football for major college football teams, a market which is dominated by the NCAA.

"(b) Second, the Rules operate as a restraint on all members of the NCAA requiring them to abide by the Rules, and not to change them or grant waivers from them. This restraint operates directly on member institutions such as Notre Dame and indirectly, although intentionally, on players such as Banks. The relevant market is all major college football institutions since all NCAA [sic] member institutions are subject to similar restrictions, and hence players like Banks, are foreclosed from choosing a major college football team based on the willingness of the institution to waive or change its rules, or consider doing so.

"(c) The Rules also operate to restrain the ability of a player such as Banks from marketing his services to the NFL, by effectively giving him one and only one realistic chance to be drafted by the NFL. The relevant market being restrained is composed of players like Banks who are considering entering the NFL draft while they still have college football eligibility remaining."

These allegations identify two markets: (1) NCAA football players who enter the draft and/or employ an agent and (2) college institutions that are members of the NCAA. Another reading of the complaint might even have deduced a third market, the NFL player recruitment market. But regardless of how charitably the complaint is read, it has failed to define an anti-competitive effect of the alleged restraints on the markets.

The dissent reasons that Banks has alleged that the NCAA no-draft rule has an anti-competitive effect in the

market for college football players. Dissent at 27. The dissent claims this anti-competitive effect is the no-draft rule "foreclos(ing) players 'from choosing a major college football team based on the willingness of the institution to waive or change [the no-draft] rule[].' " Dissent at 27 (quoting Amended Complaint ¶22(b)). This allegation can at best be described as inaccurate and further fails to allege an anti-competitive impact. First, as Banks states in ¶¶ 5-7 of his amended complaint, the NCAA has adopted the no-draft, no-agent, and other substantive rules to which all NCAA member institutions "have agreed, and do in fact, adhere." Amended Complaint ¶ 6. Contrary to Banks' erroneous allegation (¶22(b)), an NCAA member institution may not waive or change the no-draft, no-agent, rule at its discretion for it is rather obvious that only the National Collegiate Athletic Association can waive or change one of its substantive rules. 1992-93 NCAA Division I Operating Manual §14.01.5 (Compliance With Other NCAA and Conference Legislation.). Any school that sought to waive or change the rules would forfeit its ability to participate in NCAA sanctioned events.

Second, as the district court held, the complaint has failed to allege an anti-competitive impact.[10] The failure results from Banks' inability to explain how the no-draft rule restrains trade in the college football labor market. The NCAA Rules seek to promote fair competition, encourage the educational pursuits of student-athletes and

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[10] The dissent argues the no-draft rule is anti-competitive for Banks by stating: "[i]f the no-draft rule were scuttled, colleges that promised their athlete the opportunity to test the waters in the NFL draft before their eligibility expired, and returned if things didn't work out, would be more attractive to athlete than colleges that decline to offer the same opportunity." Dissent at 27-28. Unlike the dissent, we choose not to create arguments not stated in the complaint, rather, we analyze the complaint to determine whether the complaint itself has alleged an anti-competitive impact.

prevent commercialism. According to the constitution of the National Collegiate Athletic Association, the purposes of the NCAA Eligibility Rules are to maintain amateur intercollegiate athletics

> "as an integral part of the educational program and the athlete as an integral part of the student body and by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports. . . . The overriding purpose of the Eligibility Rules, thus, is not to provide the NCAA with commercial advantage, but rather the opposite extreme to prevent commercializing influences from destroying the unique 'product' of NCAA college football."

Gaines v. National Collegiate Athletic Ass'n, 746 F. Supp. 738, 744 (M.D. Tenn. 1990).

As the Supreme Court in Board of Regents stated: "most of the regulatory controls of the NCAA [are] a justifiable means of fostering competition among the amateur athletic teams and therefore are procompetitive because they enhance public interest in intercollegiate athletics." *Board of Regents*, 468 U.S. at 104, 104 S. Ct. at 2961. The Court further explained:

> "[T]he NCAA seeks to market a particular brand of football — college football. The identification of the 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. ***In order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like.*** And the integrity of the 'product' cannot be preserved except by mutual agreement; if an institution adopted such restriction

> unilaterally [restrictions on eligibility rules], its effectiveness as a competitor on the playing field might soon be destroyed. Thus the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice -- not only the choices available to sports fans but also those available to athlete -- an hence can be viewed as procompetitive."

Id. at 102, 104 S. Ct. at 2960-61 (emphasis added, footnote omitted). The no-draft rule has no more impact on the market for college football players than other NCAA eligibility requirements such as grades, semester hours carried, or requiring a high school diploma. They all constitute eligibility requirements essential to participation in NCAA sponsored amateur athletic competition.[11] Banks might just as well have alleged that only permitting a student five calendar years in which to participate in four seasons of intercollegiate athletics restrains trade. Banks' allegation that the no-draft rule restrains trade is absurd. None of the NCAA rules affecting college football eligibility restrain trade in the market for college players because the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a collegiate education.[12] Because the

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[11] "The NCAA is a private, voluntary membership organization, and, as such, any athletes participating in intercollegiate competition at its member institutions must abide by its rules to compete." Gregory J. Tarone, *Amateur Athletics and Eligibility*, 93 Case & Comment 3, 4 (May 1988).

[12] This conclusion is buttressed by the fact that a very small number of college athletes go on to participate in professional athletics. Of the over 12,000 Division 1-A college football players, less

no-draft rule represents a desirable and legitimate attempt "to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives," the no-draft rule and other like NCAA regulations preserve the bright line of demarcation between college and "play for pay" football. *Id.* at 123, 104 S. Ct. at 2972 (White, J, dissenting) (citation omitted). We consider college football players as student-athletes simultaneously pursuing academic degrees that will prepare them to enter the employment market in non-athletic occupations, and hold that the regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students. *Justice v. NCAA*, 577 F. Supp. 356, 382 (D. Ariz. 1983).

In order for the NCAA Rules to be considered a restraint of trade in violation of § 1 of the Sherman Act, Banks must allege that the no-draft and no-agent rules, as the dissent explains, are terms of employment that diminish competition in the employment market (i.e., college football). Dissent at 28 (citing *Radovich v. National Football League*, 352 U.S. 445 (1957); *Nichols v. Spencer Int'l Press*, 371 F.2d 332, 335-36 (7th Cir. 1967); Phillip Areeda and Donald F. Turner II, *Anti-trust Law*, ¶338(c) at 199-200 (1978)). The dissent refers to NCAA member colleges as "purchasers of labor" in the college football player market and the players as "suppliers" in this

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than 300 go on to the NFL each year. NCAA Participation Study (1990-91). In fact, it has been calculated that of the elite 336 players drafted each year, only 49% make NFL teams and after 5 years only 35% are still with an NFL team.

market.[13] Dissent at 27. After likening colleges to "purchasers of labor," the dissent extends the analogy to conclude that colleges offer material terms of employment to their college players and that the no-draft rule is a "material term of employment" that harms competition in the college football labor market. Dissent at 28-30.

Initially we restate that the no-draft rule and similar NCAA rules serve to maintain the clear line of demarcation between college and professional football. *Board of Regents*, 468 U.S. at 104, 104 S. Ct. at 2960-61; 1991-92 NCAA Manual §1.3.1 Basic purpose (NCAA Fundamental Policy § 1.3). In contrast to professional football, NCAA student-athletes are required to attend class, maintain a minimum grade point average, and enroll and complete a required number of courses to obtain a degree. *See* 1992-93 NCAA Manual § 1.3.1 Basic purpose (NCAA Fundamental Policy § 1.3) In contrast to professional football, NCAA student-athletes are required to attend class, maintain a minimum grade point average, and enroll and complete a required number of courses to obtain a degree. *See* 1992-93 NCAA Division I Operating

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[13] We disagree with Banks' allegation in paragraph 22(c) of his Amended Complaint that the NCAA no-draft and no-agent Rules give the college player only one realistic chance of being drafted in the NFL because the college player (1) can enter the draft any time during his college career (Tommy Maddox of UCLA was just drafted by Denver although he had two more years of eligibility); (2) enter the draft, then play for another league like the CFL, WFL, or ARENA or even sit out for a year and then reenter the draft (Bo Jackson was a first round draft choice of Tampa Bay, but he chose to play baseball instead, the next year he was drafted by the Los Angeles Raiders with whom he signed); or (3) complete his eligibility before entering the draft.

Recently 97 of the 107 NCAA Division 1-A football programs imposed strict guidelines on NFL scouts to prevent plucking student-athletes from colleges. Dennis Chaptman, *Coaches take a hard line on NFL Scouts*, Milwaukee Journal, Sept. 10, 1992 at C1.

Manual §§ 14.01.1. 14.01.02, 14.01.5, 14.1.6.2.2. The no-draft rule is evidence of the academic priority of the NCAA because it forecloses a student-athlete from hiring an agent or entering the NFL draft and after failing to meet the professional standards, returning to play college football to improve his football skills in hopes of entering an upcoming draft. In denying a college football player the right to play professional football (entering the NFL draft) and then return to college football, the no-draft rule merely serves as an NCAA eligibility requirement and precludes the existence of a college football labor market for athletes who are ineligible by NCAA standards.

Secondly, we disagree with the dissent's allegation that NCAA member schools are "purchasers of labor" as the operation of the NCAA eligibility and recruiting requirements prohibits member colleges from engaging in price competition for players. Dissent at 28-29. We fail to understand how the dissent can allege that NCAA colleges purchase labor through the grant-in-aid athletic scholarships offered to college players when the value of the scholarship is based upon the school's tuition and room and board, not by the supply and demand for players. Elimination of the no-draft and no-agent rules would fly in the face of the NCAA's amateurism requirements. Member schools might very well be exposed to agents offering the services of their football playing clients to the highest bidder. In representing their "pro athlete" clients, the agents would in all probability attempt to bargain with the NCAA school and might very well expect the school to offer their client an attractive contract possibly involving automobiles, condominiums, and cash as compensation in contravention of the NCAA amateurism rules. Such arrangements might involve cash compensation payable only in the future after the player has completed

his college eligibility and continues with an NFL club.[14] The involvement of professional sports agents in NCAA football would turn amateur intercollegiate athletics into a sham because the focus of college football would shift from educating the student-athlete to creating a "minor-league" farm system out of college football that would operate solely to improve players' skills for professional football in the NFL. We should not permit the entry of professional athletes and their agents into NCAA sports because the cold commercial nature of professional sports would not only destroy the amateur status of college athletics but more importantly would interfere with the athletes proper focus on their educational pursuits and direct their attention to the quick buck in pro sports.[15]

The no-agent and no-draft rules are vital and must work in conjunction with other eligibility requirements to

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[14] Of course the agents usually do not donate their services, they take a sizable percentage of the package as their own compensation.

[15] *See Ex-agent Bloom Gets Probation*, Chic. Trib., Aug. 28, 1992, at 7, Zone C (Agents Lloyd Bloom and Norby Walter represented 42 athletes in violation of NCAA rules). Walters received an 18-month prison sentence and a $25,000 fine for his role in enticing college players to sign secret contracts before their eligibility expired. Matt O'Connor, *Walters' sentence: 1½ years*, Chic. Trib., Sept. 18, 1992, Sec. 4 at 1, 6. (The U.S. District Judge commented that "there is so much money involved in the sports business, there is strong incentive to bend and break the rules . . . .[Walters had] total disregard for ethics and the law . . . and didn't care what he did to represent top college football stars.") *See, e.g., Division 1-AAA Fails at NCAA Convention*, United Press Int'l., Jan 9, 1992, § Sports News (Proposition 47, which now permits an underclassman to use the university to inquire as to his market value in the NFL or NBA, "is dangerous . . . [because] it increase[s] . . .the sports agents' intrusion into the players' lives); *NCAA lays off Michigan State*, USA Today, Oct. 4, 1991 at 3, Zone C (Michigan State asked sports agent Charles Tucker to stay away from its athletes after discovering Tucker permitted athletes to charge sporting goods in his store at no cost).

preserve the amateur status of college athletics, and prevent the sports agents from further intruding into the collegiate educational system.

Although we disagree with it, the dissent's "term of employment" argument reveals how Banks *could have alleged* the manner in which the no-draft and no-agent rules have an anti-competitive impact on a relevant market. Our review of Banks' amended complaint reveals that he has not alleged that college football players are regulated under "term[s] of employment" or that players are "sell[ing] their services" to their colleges. See Phillip Areeda and Donald F. Turner II, *Anti-trust Law*, ¶338(c) at 199-200 (1978). Despite the failure of Banks to allege an anti-competitive impact, the dissent again goes out of its way to read into the complaint and makes an argument for Banks by contending that college football players are really selling their services to NCAA member colleges. It is true that some colleges have been justifiably sanctioned by the NCAA for their violations of NCAA Rules regarding cash compensation and fee airline transportation between the athlete's school and home. *Justice*, 577 F. Supp. at 362 (University of Arizona); *NCAA v. Board of Regents of Univ. of Okl.*, 468 U.S. 85, 104 S. Ct. at 2947 (University of Oklahoma); *McCormack v. National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 Ind. L. J. 985 (1987); Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 Harv. L. Rev. 1299, 1312-13 (1992).

The dissent takes a surprisingly cynical view of college athletics and contends that "colleges squeeze out of their Players one or two more years of service" because the no-draft rule forces the player to choose between continued collegiate eligibility and entering the draft. Dissent at 29. This description of players "selling their services" to NCAA colleges stands in stark contrast to the academic and amateurism requirements of the vast majority of col-

lege athletic programs that, in compliance with the NCAA rules and regulations,[16] are foreclosed from offering cash compensation or "non-permissible awards, extra benefits, or excessive or improper expenses not authorized by NCAA legislation . . . ." 1992-93 NCAA Division I Operating Manual §§ 14.01.5.1 and 14.01.5.2. The fact that a minority of schools (such as the University of Houston)[17] "use" athletes rather than encourage and foster their student's academic pursuits, does not negate the fact that all NCAA member colleges encourage and require their student-athletes to carry a minimum number of semester credits and maintain a minimum grade point average equivalent to the academic program the university's non-athletic students follow.[18]

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[16] The NCAA Bylaws requires student-athletes to be "in compliance with all applicable provisions of the constitution and bylaws of the association [NCAA] and all rules and regulations of the institution . . . of which the institution is a member" to preserve their eligibility and thereby "represent an institution in intercollegiate athletic[] competition." 1992-93 NCAA Division I Operating Manual § 14.01.5 at 74.

[17] Recently, the NCAA released the graduation rates of Division I NCAA member schools. These statistics reveal that only 14% of scholarship athletes in football graduated from the University of Houston within six years of their matriculation in 1983-84 or 1984-85. *At First: NCAA discloses date of athletes by school*, USA Today, Aug. 13, 1992, at 11C [hereinafter *NCAA Graduation Rates*]. In addition, the NCAA reported that zero percent of black football athletes at the University of Houston graduated within six years of their enrollment in 1983-84 or 1984-85, whereas 33% of white football players at Houston graduated within six years of their enrollment in 1983-84 or 1984-85. Ben Brown, *Black Athletes lag behind whites in getting degrees*, USA Today, Aug. 13, 1992, at 10C.

[18] The NCAA study revealed that 52% of all students and 51% of student-athletes graduated within six years of entering college. *See NCAA Graduation Rates* at 11C; *see also* Brian L. Porto, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 Ind. L.

Specifically, the NCAA requires: "[t]o be eligible to represent an institution in inter-collegiate athletics competition, a student-athlete shall be enrolled in at least a minimum full-time program of studies, be in good academic standing and maintain satisfactory progress toward a baccalaureate or equivalent degree." 1992-93 NCAA Division I Operating Manual S 14.01.1. The term a "full-time program of studies" in § 14.01.1 of the NCAA Bylaws is defined to mean: "the student-athlete shall be enrolled in not less than 12 semester or quarter hours, regardless of the institution's definition of a minimum full-time program of studies." *Id.* at § 14.1.6.2.2. The NCAA's definition of good academic standing in § 14.01.1 is "determined by the academic authorities [of the NCAA institution] who determine the meaning of such cases for all students of the institution . . . ." *Id.* at § 14.4.1. Lastly, the NCAA defines the "satisfactory completion" requirement in § 14.01.1 as "a student-athlete shall maintain satisfactory progress toward a baccalaureate or equivalent degree at that institution as determined by the regulations of that institution."[19] *Id.* at § 14.4.2.

J. 1151, 1178 (1987) (citing 1985-86 Manual of the National Collegiate Athletic Association, NCAA Const. art. 5 § 1(c) at 89; art. 5 § 1(j)(6)(ii) at 94-95)).

[19] In addition to requiring satisfactory progress toward a baccalaureate degree, the NCAA Bylaws have a "percent of degree" minimum requirement for all student-athletes to be eligible for competition: "[1] [a] student-athlete who is entering his or her third year of collegiate enrollment shall have completed successfully at least 25% of the course requirements in the student's specific degree program . . .[; 2] a student-athlete who is entering his or her fourth year of collegiate enrollment shall have completed successfully at least 50% of the course requirements in the student's specific degree program . . .[; and 3] a student-athlete who is entering his or her fifth year of collegiate enrollment shall have completed successfully at least 75% of the course requirements in the student's specific degree program." 1992-93 NCAA Manual §§ 14.5.2-14.5.2.1.

We acknowledge that some schools adhere more faithfully to the NCAA Rules than others, but we need not reach the merits of whether the no-draft rule is a "material term of employment" as the dissent argues because Banks has failed to allege how the no-draft and no-agent rules are restraints of trade under § 1 of the Sherman Act. The most Banks alleges is that the relevant market is (1) NCAA football players who enter the draft (or employ an agent) or (2) NCAA member college institutions, and arguably a third market as the NFL player recruitment market. Beyond establishing these markets, Banks fails to illustrate how the NCAA no-draft and no-agent rule diminishes competition in those markets. We recognize that the dissent makes an anti-competitive argument, in lieu of Banks' omission in his pleading, but in evaluating the district court's Rule 12(b)(6) dismissal, "we limit our review, as we must, to the well-pleaded allegations of the complaint." *Car Carriers,* 745 F.2d at 1107. Thus, any additional markets or anti-competitive effects upon them alleged outside the amended complaint are immaterial to our consideration of the district court's judgment. Although on review of a Rule 12(b)(6) dismissal we accept all allegations in the complaint as true, " 'a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory.' " *Id.* at 1106 (citation omitted). The questions in regard to Banks' allegations of restraints on trade is whether

> "the plaintiffs have successfully pleaded a contract, combination, or conspiracy in restraint of trade within the meaning of the Sherman Act. The pleader may not evade these requirements by merely alleging a bare legal conclusion; if the facts 'do not at least outline or adumbrate' a violation of the Sherman Act, the plaintiffs 'will get nowhere merely by dressing them up in the language of antitrust.' "

Id. (citation omitted).

We agree with the district court's finding that the plaintiff has failed to allege an anti-competitive effect on a relevant market; at best Banks has merely attempted to frame his complaint in antitrust language.[20] While Banks alleges a restraint on the market of college football players, college institutions who are members of the NCAA, and perhaps an NFL player recruitment market, the complaint fails to explain how these alleged restraints diminish competition in or among the markets. In our review of Banks' arguments in his appellate briefs as well as our review of the oral argument, we have been unable to discern a cogent argument articulated even on appeal that the alleged restraints impose an anti-competitive effect on the alleged markets. The appellant merely claims that there is an anti-competitive effect, but he fails to explain what it is. While Banks might possibly have been able to allege an anti-competitive impact on a relevant market through a more carefully drafted complaint or an amendment to his complaint, he failed to do so. It is not

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[20] The dissent's generous and expansive reading of Banks' complaint makes the argument for him that his injury is "of the type the antitrust laws were intended to prevent and that flow from that which makes [the NCAA rules] unlawful," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1980), or in other words, that Banks' injury is "attributable to the allegedly anticompetitive aspect of those rules." Dissent at 30 (citing *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10 (1986)). To the contrary, Banks' alleged injury, namely the revocation of his eligibility and loss of his athletic scholarship at Notre Dame, does not "flow from" his complaint wherein he states the NCAA rules "foreclos[e players] from choosing a major college football team based on the willingness of the institution to waive or change [the NCAA rule at issue] . . . ." Amended Complaint ¶ 22(b). Nowhere in Banks' complaint does he tie his alleged antitrust injury with the no-draft or no-agent rules' allegedly anti-competitive impact, rather he broadly concludes "the Rules operate as a restraint on all members of the NCAA . . . ." Amended Complaint ¶ 22(b).

for us, as appellate judges, to re-structure his complaint for him.

VI. CONCLUSION

Since Banks' claim on behalf of the class for injunctive relief is moot as to him, and it is not so transitory so as to prevent a trial court from ruling on a motion for class certification before the claim of any named plaintiff would become moot, we hold that Banks is without standing to pursue the merits of the claim on behalf of the class. This holding is of little consequence, however, as we also hold that Banks' failure to allege an anti-competitive impact on a discernible market justified the district court's dismissal for failure to a state claim upon which relief can be granted. The appellant's argument that the district court erred in ruling that the NCAA rules were reasonable on a motion to dismiss is without merit, for the basis of the district court's holding was that Banks failed to allege an anti-competitive effect on a market. The judgment of the district court is

AFFIRMED.

FLAUM, Circuit Judge, concurring in part and dissenting in part. This is a "rule of reason" case brought under § 1 of the Sherman Antitrust Act, *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984), and as such the panel correctly states that Braxston Banks must allege that the NCAA rules at issue harm competition in some relevant market to get his foot in the door. *Great Escape, Inc. v. Union City Body Co., Inc.*, 791 F.2d 532, 539 (7th Cir. 1986); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106-07 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985). After quoting liberally from Banks' complaint, the panel concludes that he failed to meet his burden. Granted, the complaint was drafted somewhat inelegantly, but I nonetheless believe that it defines a market and describes how the NCAA rules harm competition in that market. Accordingly, I respectfully dissent from the panel's affirmance of the district court's dismissal of Banks' second cause of action.*

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* At the outset of its analysis, the panel charges that, on appeal, Banks "ignore[d]" the district court's holding that he failed to allege an anticompetitive impact upon an identifiable market. See Op. at 10. This charge, I suggest, is mistaken. The portion of Banks' brief quoted by the panel refers to two rulings entered by the district court. The first denies Banks' motion for a preliminary injunction against the NCAA to restore his eligibility -- he was declared ineligible pursuant to the no-draft and no-agent rules to play football for Notre Dame during his final year there. *Banks v. National Collegiate Athletic Ass'n*, 746 F. Supp. 850 (N.D. Ind. 1990) ["*Banks I*"]. Banks did not appeal this ruling. Instead, he filed an amended complaint seeking a permanent injunction on behalf of a class of players (not including himself) against enforcement of the rules, and damages resulting from his ineligibility. The district court's dismissal of the amended complaint, *Banks v. National Collegiate Athletic Ass'n*, No. S90-394 (N.D. Ind. Feb. 20, 1991) ["*Banks II*"], is the second ruling, and the one at issue in this appeal. Banks' characterization in his brief of these two rulings is right on the money. *Banks I* found that he had "posited a credible anti-competitive effect" of the no-draft and no-agent rules, *Banks I*, 746 F. Supp. at 860, but nonetheless denied his motion for a preliminary injunction on the ground that the rules' procompetitive

The parties agree that Banks, to survive the NCAA's motion to dismiss, must define a relevant market and allege how the challenged rules adversely affect competition in that market. *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 268 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982). As the NCAA concedes, Banks defined two markets in his complaint, only one of which it is necessary to address here: the nationwide labor market for college football players. *See* Amended Complaint ¶ 22(a)-(b). NCAA member colleges are the purchasers of labor in this market, and the players are the suppliers. The players agree to compete in football games sponsored by the colleges, games that typically offer the colleges a profit, in exchange for tuition, room, board and other benefits.

Banks also alleges how the NCAA rules at issue -- I will focus upon the no-draft rule -- harm competition in that market: they foreclose players "from choosing a major college football team based on the willingness of the institution to waive or change [the] rule[ ]." Id. ¶ 22(b). It is hardly a revelation that colleges fiercely compete for the most promising high school football players — the players who, incidentally, are most likely to feel constrained by the challenged rules two or three years down the line. If the no-draft rule were scuttled, colleges that promised their athletes the opportunity to test the waters in the NFL draft before their eligibility expired, and return if things

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effects outweighed any anticompetitive effects under the rule of reason. *Id.* at 860-62. *Banks II* (the "subsequent opinion" to which Banks refers in his brief) shifted gears by dismissing Banks' amended complaint on the ground that it did not allege any anticompetitive effects. *Banks II*, slip op. at 11. The court did not, however, really explain its change of heart. Contrary to the panel's contentions, Banks did assign error to the holding of *Banks II*. *See* Pl.'s Br. at 21-27 (contending that Banks has alleged anticompetitive effects). Any confusion arises from the fact that Banks was compelled to address the arguments presented in the NCAA's brief below because *Banks II*'s analysis of this issue was so thin.

didn't work out, would be more attractive to athletes than colleges that declined to offer the same opportunity. The no-draft rule eliminates this potential element of competition among colleges, the purchasers of labor in the college football labor market. It categorically rules out a term of employment that players, the suppliers of labor in that market, would find advantageous. *Cf. FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (considering "a horizontal agreement among . . . dentists to withhold from their customers a particular service that they desire").

It is well settled that an agreement among employers to control a material term of employment harms competition in the labor market at issue. *Radovich v. National Football League*, 352 U.S. 445 (1957); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 335-36 (7th Cir. 1967); Phillip Areeda and Donald F. Turner II, *Anti-trust Law*, ¶338(c) at 199-200 (1978); Annotation, *Validity, Under the Federal Antitrust Laws (15 USC §§ 1 et seq.) of Agreements Between Employers or Employer Associations Imposing Restrictions on Employment*, 2 A.L.R. Fed. 839 (1969 and 1991 Supp.) (citing cases); *cf. Ball Memorial Hosp. Ins., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) (conspiracy among buyers to depress prices harmful to competition). It should come as no surprise that the no-draft rule operates to the detriment of the players, and that colleges benefit from the fact that their athletes feel tied to the institution for four years. Consider, for example, athletes who are known in the vernacular as "bubble" players. These athletes are excellent competitors at the collegiate level, but for various reasons are considered less than certain NFL prospects. Bubble players who wish to market their wares in the professional market after their sophomore or junior year will forego entry into the NFL draft because, if they are not selected (or fail to join a team after being selected), the rule will prevent them from returning to college to hone their skills and try again in subsequent years. *See* Note, *Sherman Act*

Invalidation of the NCAA Amateurism Rules, 105 Harv. L. Rev. 1299, 1311 (1992). The rule permits colleges to squeeze out of their players one or two more years of service, years the colleges might have lost had the ability to enter the draft without consequence to eligibility been the subject of bargaining between athletes and colleges. *See* Rhoden, *Smoke, Mirrors and Doubletalk From the N.C.A.A.*, N.Y. Times, Jan. 11, 1992, at 29. The rule thereby distorts the "price" of labor in the college football labor market to the detriment of players.

The NCAA disputes this characterization, maintaining that the no-draft rule is not "anticompetitive" as the term is employed under the Sherman Act. At the heart of its argument is the contention that "there is no price competition as such among colleges for players because the 'price,' the value of grant-in-aid, is determined by the school's tuition, room, and board, not by the supply of and demand for players." Def.'s Br. at 20. This analysis of the college football labor market is partially correct; in that market, players exchange their labor for in-kind benefits, not cash. At least ideally. *But see* Johnson, *Defense Against the NCAA*, U.S. News & World Rep., Jan 13, 1992, at 25 (improper cash payments made to football players at Auburn University); Johnson, *Playing for Pay in Texas*, Newsweek, Mar. 16, 1987, at 32 (same at Southern Methodist University).

It is unrealistic, however, to suggest that the value of those in-kind benefits is limited solely to tuition, room and board. If this were true, the best football players would attend the most expensive private universities that would admit them, for these universities would offer, under the NCAA's analysis, the most "valuable" compensation for their services. Assuming some regional loyalties, private colleges such as Syracuse University, the University of Southern California, and Notre Dame would consistently out-recruit public colleges such as Penn State, UCLA and

the University of Michigan. As anyone familiar with college football well knows, this is not the case. The reason is simple. Athletes look to more than tuition, room and board when determining which college has offered them the most attractive package of in-kind benefits. Some athletes look primarily to the reputation of a particular program or coach as a "feeder" into the NFL; others believe that the quality of a university's academic program and the commitment of the coaching staff to scholarly pursuits is more important. Some athletes look to whether a college will offer them a cushy, high-paying job during the summer or school year; others might be attracted by state-of-the-art training facilities. And some athletes, if given the chance, would look to whether a college would allow them to enter the NFL draft and return if they did not join a professional team.

All of these things — with the exception of the last item — are "terms of employment" that currently sweeten the pot for athletes choosing among college football programs. They provide, apart from tuition, room and board, the means by which colleges, as purchasers of labor, attract and compensate their players, the suppliers of labor. That the medium of exchange is non-monetary does not alter the fact that these benefits constitute the "price" of labor in the college football market, or that the categorical elimination of one of those benefits harms competition in that market. The NCAA's protestations notwithstanding, there can be no doubt that Banks has alleged an anticompetitive effect in a relevant market.

A couple of other matters regarding the confusing and often confused issue of "antitrust injury" warrant brief attention. The panel, as well as the district court, alludes to Banks' supposed failure to allege that the NCAA rules have caused him to suffer antitrust injury. *See* Op. at 10; Banks II, slip op. at 11. I respectfully suggest that Banks has satisfied this burden. Section 4 of the Clayton Act

requires private plaintiffs seeking relief under the antitrust laws to demonstrate antitrust injury, *Brunswick Corp. v. Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197, 1200-02 (7th Cir. 1986), something necessary, though not sufficient to establish antitrust standing. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5 (1986); *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1377 (7th Cir. 1987). Banks cannot clear this threshold merely by showing that his injury is causally linked to the NCAA's alleged trust violation. Rather, he must also show that his injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes [the NCAA rules] unlawful," *Brunswick*, 429 U.S. at 489, or, put another way, that his injury is attributable to the allegedly anticompetitive aspect of those rules. *Cargill*, 479 U.S. at 109-110. The requirement, in short, compels him "to connect the injury claimed to the purposes of the antitrust laws." Areeda and Turner, VIII *Antitrust Laws, supra*, ¶1640c, at 444.

Banks easily clears this threshold. The no-draft rule, as noted, is anticompetitive because it constitutes an agreement among colleges to eliminate an element of competition in the college football labor market. The purposes of the antitrust laws are served when employers are prevented from tampering with the employment market in this precise way. "Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services . . . ." Areeda and Turner, II *Id.* ¶338c, at 199-200; *see also Quinonez v. National Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824, 828 (5th Cir. 1976). Banks' injury — namely, the revocation of his eligibility and consequent loss of his athletic scholarship during his final year at Notre Dame — flows from the precise anticompetitive aspects of the NCAA rules that he set out in his complaint.

Our discussion of antitrust injury in *Bicham v. Chemetron Corp. (In re Industrial Gas Antitrust Litigation)*, 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983), confirms this conclusion. There, an executive terminated by a corporation charged that the corporation had participated in a horizontal conspiracy to fix prices, and that he had been fired and blacklisted for refusing to adhere to the conspiracy. We held that the executive had failed to demonstrate antitrust injury because the harm inflicted upon him by the corporation was not "inextricably related to, and caused by" the anticompetitive effect of the alleged price fixing activities in the product market. *Id.* at 515. In so holding, we distinguished *Radovich v. National Football League, supra*, and *Nichols v. Spencer Int'l Press, Inc., supra*. Both of those cases, like *Bicham*, involved antitrust suits brought by employees against their employers, but, unlike Bicham, both considered alleged Sherman Act violations involving anticompetitive activities among employers in the *labor* market, not the *product* market. It follows, we observed, that the plaintiffs in *Nichols* and *Radovich* had demonstrated antitrust injury because "the conspiracies in both cases were intended to restrict competitive conditions in the labor market, [and] the injuries complained of, restriction of employment alternatives, were directly related to the anticompetitive restraints." *Bicham*, 681 F.2d at 517. Banks' complaint, which alleges restrictive competitive conditions in the relevant labor market, falls squarely within the rubric of Nichols and Radovich. *See generally* Frederick Woodbridge, Jr., *Employee Standing in Private Antitrust Suits: A New Element in the Balance*, 51 U. Cin. L. Rev. 878 (1982).

The NCAA also raises the issue of harm to consumers; it contends that Banks' complaint is deficient because it does not "reasonably support the inference that consumers are harmed by the operation of the no-draft and no-agent rules." Def.'s Br. at 23. Whether harm to consumers is the *sine qua non* of antitrust injury is an issue over which there

is currently a split in this circuit. Some of our cases hold that a plaintiff, to satisfy the antitrust injury requirement, must demonstrate that the challenged practice causing him harm also harms consumers by reducing output or raising prices. *Stamatakis Indus., Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992); *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 670 (7th Cir. 1992). Others hold that application of the antitrust laws "does not depend in each particular case upon the ultimate demonstrable consumer effect." *Fishman v. Estate of Wirtz*, 807 F.2d 520, 536 (7th Cir. 1986); *see also Chicago Professional Sports*, 961 F.2d at 677 (Cudahy, J. concurring).

One can dispense with the NCAA's contention without choosing sides in this dispute. To see why, it is important first to identify the consumers and the market at issue in this case. By "consumers," the NCAA apparently means people who watch college football. These individuals certainly are consumers in the college football product market, but the market at issue here is the college football labor market, and the NCAA member colleges are consumers in that market. It would be counterintuitive to require Banks to demonstrate that the no-draft and no-agent rules harm the colleges, the very entities that established those rules. I doubt very strongly that the rule laid out in *Chicago Professional Sports*, to the extent it is valid elsewhere, was intended to apply in this context. Concerted action among consumers that lowers prices harms competition as much as concerted action among producers that raises prices. The distinction should be irrelevant to any discussion of antitrust injury. *See Ball Memorial Hosp.*, 784 F.2d at 1338. Professors Areeda and Turner, when discussing the right of laborers to challenge antitrust violations in the labor market, put things nicely:

> It would be perverse . . . to hold that the very object of the law's solicitude and the persons most directly

> concerned — perhaps the only persons concerned — could not challenge the restraint. . . . The standing of such plaintiffs is undoubted and seldom challenged.

Areeda & Turner, II *Antitrust Law*, *supra*, ¶338c, at 200; *see also* Phillip Areeda & Louis Kaplow, *Antitrust Analysis* ¶ 148(c), at 90 (4th ed. 1988). Banks has alleged that the NCAA rules harm competition to the detriment of producers in the college football labor market, and that his injuries are directly related to that harm. This is sufficient to establish "antitrust injury" in this context. See *Bicham*, 681 F.2d at 517 (discussing *Radovich* and *Nichols*).

I add here a caveat to avert any potential misunderstandings. My point is only that Banks has properly alleged an anticompetitive effect in a relevant market and has demonstrated antitrust injury, and hence that his damages action should survive the NCAA's motion to dismiss. But this is, of course, only the first step. To ultimately prevail, Banks also must demonstrate, under the rule of reason, that the no-agent and no-draft rules, despite their anticompetitive effects, are not "justifiable means of fostering competition among amateur athletic teams and therefore procompetitive" on the whole. *Board of Regents*, 468 U.S. at 117. It may very well be that the no-draft and no-agent rules are essential to the survival of college football as a distinct and viable product in which case Banks would lose. A lively debate has arisen among those who have already considered this matter. *Compare Gaines v. National Collegiate Athletic Ass'n*, 746 F. Supp. 738, 746-47 (M.D. Tenn. 1990) (NCAA rules survive rule of reason analysis) and *Banks I*, 746 F. Supp. at 860-62 (same) *with* Note, *NCAA Amateurism Rules*, *supra*, at 1309-12 (would find NCAA rules invalid under rule of reason). I opt not to join the fray here, for I think it unwise to weigh pro- and anticompetitive effects under the rule of reason on a motion to dismiss. *See Wilk v. American Medical Ass'n*, 895 F.2d 352, 358, (7th Cir.), *cert.*

denied, 496 U.S. 927 (1990) (rule of reason considers "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business involved, the particular restraint's history, and the reasons it was imposed").

Today's decision, by holding that Banks has not alleged that the rules are anticompetitive in the first instance, deprives him of the opportunity to join this issue on remand. As I have discussed, it is difficult to reconcile this holding with a sound reading of Banks' complaint. On a broader level, I am also concerned that today's decision -- unintentionally, to be sure, for it suggests that a "more artfully drafted complaint" could have alleged an anticompetitive effect in this market -- will provide comfort to the NCAA's incredulous assertion that its eligibility rules are "noncommercial." See Def.'s Br. at 20 n.10. The NCAA would have us believe that intercollegiate athletic contests are about spirit, competition, camaraderie, sportsmanship, hard work (which they certainly are) . . . and nothing else. *See NCAA Constitution*, art. 3, § 1 (1986) (student-athlete is one "who engages in a particular sport for the educational, physical, mental and social benefits he derives therefrom and to whom participation in that sport is an avocation"). Players play for the fun of it, colleges get a kick out of entertaining the student body and alumni, but the relationship between players and colleges is positively noncommercial. See Sharon Elizabeth Rush, *Touchdowns, Toddlers, and Taboos: On Paying College Athletes and Surrogate Contract Mothers*, 31 Ariz. L. Rev. 549, 576-77, 581-82, 587-88 (1989) (discussing images of intercollegiate sports); Arthur D. Austin, *Book Review*, 58 N. Car. L. Rev. 660, 663 (1980) (discussing contemporary myth which portrays student-athletes "as students, who, in the off hours away from dedication to the books, happen to participate in organized sports"). It is consoling to buy into these myths, for they remind us of a more innocent era where recruiting scandals were virtually unknown, where

amateurism was more a reality than an ideal, and where post-season bowl games were named for commodities, not corporations. *See House: Don't Tax Bowls' Sponsors*, Chi. Daily L. Bull. July 29, 1992, at 1 (House of Representatives votes to block Internal Revenue Service from taxing Mobil Cotton Bowl on the approximately $1.5 million a year it receives from Mobil). On the flip side, it is disquieting to think of college football as a business, of colleges as the purchasers of labor, and of athletes as the suppliers.

The NCAA continues to purvey, even in this case, an outmoded image of intercollegiate sports that no longer jibes with reality. The times have changed. College football is a terrific American institution that generates abundant nonpecuniary benefits for players and fans, but it is also a vast commercial venture that yields substantial profits for colleges, *see, e.g., Board of Regents*, 468 U.S. at 92-94; *National Collegiate Athletic Association, Revenues and Expenses of Intercollegiate Athletic Programs* 15 (1990) (estimating that sports revenues at Division IA schools exceeds one billion dollars per year); D. Devenzio, *Rip Off U: The Annual Theft and Exploitation of Major College Revenue-Producing Athlete* 106-08 (1986) (University of Michigan football program posted a $2 million profit in 1984); Arthur D. Austin, *The Legality of Ticket Tie-Ins in Intercollegiate Athletics*, 15 U. Rich. L. Rev. 1, 1 (1980), both on and off the field. *See, e.g.*, Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 Notre Dame L. Rev. 206, 206 (1990); Rush, *Touchdowns, Toddlers, and Taboos, supra*, at 553, 570; *It Pays to Win . . . Or to Lose*, N.Y. Times, June 8, 1986, § 5, at 8 (during time Heisman Trophy winner Bo Jackson played football for Auburn University, annual applications increased from 4500 to 6200); Clark, *The Business of Education: Does Athletics Help or Hurt?*, Wall St. J., Aug. 26, 1985, at 25 (athletic success of Clemson University increased average amount of alumni donations). The games provide fans with

entertaining contests to watch, and athletes with an opportunity to display and develop their strength, skills and character, but they are saleable products nonetheless. *Board of Regents*, *supra*. An athlete's participation offers all of the rewards that attend vigorous competition in organized sport, but it is also labor, labor for which the athlete is recompensed. The no-draft and no-agent rules may, ultimately, pass muster under the rule of reason. But, putting the adequacy of Banks' complaint to the side, contending that they have no commercial effect on competition in the college football labor market, or that there is no market of that type at all, is chimerical:

> The true stake is this decades-long gentleman's agreement between the NFL and the college powers-that-be that has kept all but a handful of football playing collegians from turning pro before their four-year use to their schools is exhausted. The pros get a free farm system that supplies them with well-trained, much publicized employees. The colleges try to keep their players the equivalent of barefoot and pregnant.

Klein, *College Football: Keeping 'em Barefoot*, Wall St. J., Sept. 4, 1987, at 15.

When confronted with the dash between soothing nostalgia and distressing reality, it is oftentimes difficult to resist the call of tennis champion Andre Agassi, who when hawking cameras off the court tells us that "image is everything." But we must remember that Agassi's domain, at least in this instance, is television. What may be true there is decidedly not under the lens of the antitrust laws. *See National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 696 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 786-88 (1975). Having found that Banks has cleared the threshold of alleging an anticompetitive effect in a relevant market, I would reverse the district court's

dismissal of his damages action and remand for further proceedings.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

BRAXSTON LEE BANKS	)	
	)	
Plaintiff	)	
	)	
v.	)	CAUSE NO.S90-394
	)	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and UNIVERSITY OF NOTRE DAME,	)	
	)	
Defendants	)	

MEMORANDUM AND ORDER

This cause came before the court on August 16, 1990 for hearing on the motion of plaintiff Braxston Banks for a temporary injunction. Mr. Banks seeks injunctive relief against the National Collegiate Athletic Association ("NCAA") and the University of Notre Dame to restore his eligibility to play intercollegiate football for Notre Dame during the 1990 season. Without injunctive relief, he will be ineligible to play because he entered the National Football League ("NFL") draft and was represented by an attorney in his dealings with NFL teams; NCAA rules deem a person who has done such things a professional and ineligible to play amateur intercollegiate football. For the reasons that follow, the court concludes that Mr. Banks has not shown any likelihood of success on his contention that the NCAA rules violate § 1 of the Sherman Antitrust Act. Without such a showing, no preliminary injunction can be issued.

This memorandum is intended to comply with the requirements of Federal Rule of Civil Procedure 52(a) concerning findings of fact and conclusions of law.

I.

The NCAA is a private, voluntary, unincorporated association of approximately 1,017 members, consisting of colleges and universities (including Notre Dame), conferences and associations, and other education institutions. According to the NCAA constitution, the NCAA's purpose is to promote intercollegiate athletics in the United States and to maintain amateur intercollegiate athletics "as an integral part of the educational program and the athlete as an integral part of the student body and by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." Approximately 187 colleges that play intercollegiate football are members of the NCAA. It is the dominant association of colleges and universities that engage in intercollegiate athletics.

The NCAA Bylaws constitute rules regarding all intercollegiate athletics, including football, to which all members are required to adhere and which the NCAA enforces. Among those rules is Bylaw 12.2.4.2 (the "no draft" rule), which makes an athlete ineligible for further intercollegiate play, in any sport in which he or she has placed his name in the professional draft, even if the athlete asks that his or her name be withdrawn from the draft list, or the athlete is not drafted, or the athlete does not sign an agreement with a professional team.[1]

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[1] Bylaw 12.2.4.2 provides:

An individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a

Another provision, Bylaw 12.3 (the "no agent" rule), makes an individual who agrees to be represented by an agent (including an attorney) to market the player's services ineligible for further intercollegiate play in the sport, even if the player accepts no money or other thing of value from the agent.[2]

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professional league in that sport, even though:

(a) The individual asks that his or her name be withdrawn from the draft list prior to the actual draft,

(b) The individual's name remains on the list but he or she is not drafted, or

(c) The individual is drafted but does not sign an agreement with any professional athletics team.

[2] Bylaw 12.3 provides:

12.3.1 General Rule. An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports and the individual shall be ineligible to participate in any sport.

12.3.2. Legal counsel. Securing advice from a lawyer concerning a proposed professional sports contract shall not be considered contracting for representation by an agent under this rule, unless the lawyer also represents the student-athlete in negotiations for such a contract.

12.3.2. 1 Presence of a Lawyer at Negotiations. A lawyer may not be present during discussion of a contract offer with a professional organization or

NCAA officials are giving serious consideration to modification of the "no draft" rule, but no modification of the rule could occur before the NCAA's annual convention in 1991. No proposals to amend the "no draft" rule at that convention have been filed to date. Nothing in the record suggests that NCAA officials are considering modification of the "no agent" rule.

The NCAA Bylaws also contain a provision, 14.14, which sets out a procedure by which a member institution such a Notre Dame (but not the student-athlete) can petition the NCAA to restore a student-athlete's eligibility.[3]

A.

The facts are not in substantial dispute. Braxston Lee Banks entered the University of Notre Dame as a student-athlete in September, 1986 on a full grant-in-aid, which is worth approximately $16,000.00 per year. He

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have any direct contact (i.e., in person, by telephone or by mail) with a professional sports organization on behalf of the student-athlete. A lawyer's presence during such discussions is considered representation by an agent.

[3] Bylaw 14.14.1 provides:
14.14.1 Basis for Appeal. When a student-athlete is determined to be ineligible under any applicable provision of the constitution, bylaws or other regulations of the Association, the member institution, having applied the applicable rule and having withheld the student-athlete from all intercollegiate competition, may appeal to the Eligibility Committee for restoration of the student's eligibility, provided the institution concludes that the circumstances warrant restoration of eligibility.

played football for Notre Dame during the 1986-88 seasons.

Mr. Banks played all eleven games for Notre Dame during his freshman year, starting four or five. In his sophomore year, he injured his knee in the opening game and played in only seven games. Largely because of his knee injury, he again played in only seven games during his junior year. He started four games in each of those seasons. Although the Notre Dame football trainer released him to full activity in June, 1989, Mr. Banks sat out the 1989 college football season -- his senior year -- in in the hopes of assuring his knee's full recovery.

Having played three seasons and missed one season due to injury, Mr. Banks was eligible to play one more year of intercollegiate football, but because eligibility lasts for only five years after enrollment, that year would have to be 1990. Because his class would graduate in 1990, however, Mr. Banks also had, under then-existing NFL rules, the option of entering the NFL selection process, or "draft". The NCAA's "no draft" rule would not allow him to do both. In December, 1989, Mr. Banks began what obviously was a time of hesitation and indecision.

Mr. Banks discussed his options with his family and friends, including several former Notre Dame football coaches who were then coaching in the professional ranks. He also discussed the matter with Everett Glenn, a family friend and sports attorney, who had once advised Mr. Banks on another sports matter when Mr. Banks was in high school. At Mr. Glenn's suggestion, he contacted the "scouting combines" that work directly for NFL teams in evaluating players.[4] He was told that he was a "rated"

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[4] This contact would not appear to have rendered Mr. Banks ineligible for further intercollegiate football

player (meaning that had he completed his college eligibility, he would have been invited to be scouted) and that he should be drafted.

Still, Mr. Banks had doubts about whether he would be drafted. His classmate, Anthony Johnson, was expected to be chosen early in the NFL draft. While he had started ahead of Mr. Johnson in some games before his injury, Mr. Banks knew his knee injury might make NFL teams chary of drafting him.

In February, 1990, still uncertain, Mr. Banks applied to Notre Dame to continue his education for a fifth year and to renew his grant-in-aid. Notre Dame orally approved his application, which would have enabled him to play football for Notre Dame during the 1990 season.

In March, 1990, however, Mr. Banks decided to enter the 1990 National Football League draft and signed the form required by the NFL for draft eligibility. Indeed, he actually signed the form twice. His signature was not notarized on the first form, which the NFL received on or about March 13, 1990. The NFL received a second, properly notarized, form on or about March 20, 1990. He reports that at some point he changed his mind about entering the draft and called the NFL to ask that his petition be disregarded. He was told to send a letter. He changed his mind again and left his petition on file.

Both forms required Mr. Banks to sign immediately below a paragraph that read, "I HEREBY IRREVOCABLY RENOUNCE ANY AND ALL

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participation. NCAA Bylaw 12.2.4.1 provides:

> Inquiry. An individual may inquire about eligibility for a professional-league player draft without affecting his or her amateur status.

REMAINING COLLEGE ELIGIBILITY I MAY HAVE. I WISH TO BE ELIGIBLE FOR THE NFL DRAFT SCHEDULED FOR APRIL 22-23, 1990."

By placing his name in the 1990 NFL draft, Mr. Banks lost his amateur status for football and, hence, became ineligible to play intercollegiate football by virtue of NCAA Bylaw 12.2.4, the "no draft" rule. The language on the NFL form did not make him ineligible; the NCAA Bylaw did. The parties agree that principles of contract law are not at issue in this case.

B.

After deciding to enter the draft, Mr. Banks contacted NFL teams through Mr. Glenn. Although he had no oral or written contract with Mr. Glenn or any other agent or attorney to represent him in marketing his athletic ability or reputation before entering the 1990 NFL draft, he entered an oral argument with Mr. Glenn after deciding to enter the draft, and Mr. Glenn tried to market Mr. Banks' services. Mr. Glenn sent the following letter to all twenty-eight NFL teams:

> Please be advised that this office will represent Braxston Banks in the upcoming NFL draft. As a fifth year senior who will receive his bachelor's degree in May, Braxston has petitioned the NFL and been cleared to be included in the upcoming draft.
>
> For the record, Braxston is 6'3", 235 lbs. (not 215 lbs. per 1989 info of BLESTO [a scouting service]) and recently ran a 4.5 for an NFL scout. It is also noted that Braxston started for two years at Notre Dame ahead of the player rated by many observers as the top fullback prospect in the draft.

> According to Mr. Butler of BLESTO, Braxston will be invited to participate in the April 6-7 workouts. we trust that you will take the time to visit with Braxston to satisfy yourself about Braxston's physical condition and to otherwise update his file.
>
> Thanks in advance for your consideration.

Mr. Banks received no compensation or other thing of value from Mr. Glenn or any other agent or attorney. Nonetheless, by agreeing to have Mr. Glenn market his athletic ability in football, the NCAA "no agent" rule, Bylaw 12.3, rendered him ineligible, on a second basis, to play intercollegiate football.

After he placed his name in the draft, Mr. Banks was contacted and tested at Notre Dame by representatives of virtually all NFL teams, and he attended an NFL tryout in Indianapolis with other college players who had entered the draft before completing their college eligibility. At that trial he did not perform as well as he had in the past, especially in the 40 yard dash. Mr. Banks attributes this to the cold weather, lack of adequate warm-up, and his decision (because the tryout was conducted on artificial turf) to wear a knee brace that ran from his thigh to his ankle and that apparently concerned the professional scouts. Only two NFL teams contacted him after the Indianapolis tryout.

Mr. Banks was not chosen in the draft. That misfortune rendered him a "rookie free agent in the eyes of the NFL, meaning that he was free to contract with any of the twenty-eight NFL teams.[5] No professional team

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[5] The record also reflects the existence of the Canadian Football League ("CFL"), which is comprised of

offered him a free agent contract, although he travelled to Pittsburgh for a post-draft tryout. He thought he did well in Pittsburgh, but the coaches told him they already had the maximum permissible number of players under contract.[6] Mr. Banks received nothing from the Pittsburgh team other than his airplane ticket to fly to and from Pittsburgh.

Banks completed the requirements for his degree at Notre Dame during the summer semester of 1990 and graduated from Notre Dame with a Bachelor of Arts degree in English in August 1990.

C.

As of today, Mr. Banks has never signed a contract with any professional football team and has never received any compensation from any professional team, although he received travel reimbursement for the tryout in Indianapolis and a round trip plane ticket to fly to Pittsburgh for his tryout.

As a result of Bylaws 12.2.4 and 12.3, the NCAA considers Mr. Banks to be ineligible to play football for any NCAA institution. Any NCAA institution that allowed him to play would be subject to serious penalties by the NCAA. Despite the procedure made available by NCAA

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nine teams. Whether Mr. Banks could have applied for employment with a CFL team is not apparent from the record.

[6] An NFL team may have as many as eighty players under contract at any one time during the off-season. Each team must reduce its roster to sixty players by August 28, 1990 and to forty-seven players by September 3, 1990.

Bylaw 14.14, Notre Dame has declined to seek restoration of Mr. Banks' eligibility. Mr. Banks attempted in June and July to request the NCAA to restore his eligibility, but the NCAA indicated it would consider only a request from Notre Dame, the member institution.

The NCAA has taken no steps to discipline Mr. Banks; other than declining to consider his-application for restoration of his eligibility, the NCAA has taken no action toward Mr. Banks whatsoever. Notre Dame, however, as a member of the NCAA, is expected to enforce the NCAA's eligibility requirements.

Mr. Banks wants to return to Notre Dame to continue his education, to play football again for Notre Dame, and to prove to the NFL teams that his knee is well enough to play professional football. But for his ineligibility based on Bylaws 12.2.4 and 12.3, Notre Dame would admit Mr. Banks for a fifth year of academic study, renew his full grant-in-aid, and permit him to play football again. Notre Dame will not renew his full grant-in-aid unless he is eligible to play football. Football practice begins at Notre Dame on August 17, 1990, and the first game is scheduled for September 15, 1990.

II.

On August 9, 1990, Mr. Banks filed this action against the NCAA and Notre Dame. Count I of the complaint, which is brought solely on Mr. Banks' behalf, alleges that NCAA Bylaws 12.2.4 and 12.3 violate § 1 of the Sherman Act, 15 U.S.C. § 1. Pursuant to Count I of the complaint, Mr. Banks seeks to preliminarily enjoin the defendant NCAA from taking any action to enforce, or to encourage any of its members to enforce, NCAA Bylaws 12.2.4 and 12.3 with respect to him. The court has jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 26. Mr.

Banks seeks a preliminary injunction with respect to Count I of his complaint.

A.

> The purpose of a preliminary injunction is to minimize the hardship to the parties pending the ultimate resolution of the lawsuit. It is an interlocutory form of relief which requires the district court to assess the probability that each party will prevail on the merits and the harm of granting or withholding relief during the pendency of the suit.

Faheem-El v. Klincar, 841 F.2d 712, 717 (7th Cir. 1988) (en banc).

A party seeking a preliminary injunction bears the burden of showing: (1) that he will suffer irreparable harm without the preliminary injunction; (2) that the harm he will suffer without injunctive relief is greater than the harm the defendant will suffer as a result of injunctive relief; (3) a reasonable likelihood of success on the merits; and (4) that the injunction will not harm the public interest. *Kinney v. Pioneer Press*, 881 F.2d 485, 490 n.3 (7th Cir. 1989); *Baja Contractors, Inc. v. Chicago*, 830 F.2d 667, 675 (7th Cir. 1987) *cert. denied* 485 U.S. 993 (1988); *Manbourne, Inc. v. Conrad*, 796 F.2d 884 (7th Cir. 1986). An injunction is improper if the movant has an adequate remedy at law, *Scruggs v. Moellering*, 870 F.2d 376, 378 (7th Cir.), *cert. denied*, 110 S. Ct. 371 (1989), but the NCAA and Notre Dame concede that Mr. Banks has no such adequate remedy.

Mr. Banks must satisfy each of these elements. *Somerset House, Inc. v. Turnock*, 900 F.2d 1012, 1015 (7th Cir. 1990). A plaintiff need not, depending upon the severity of the harm he will suffer if the injunction does not issue,

demonstrate a high probability of success on the merits of his claim; it may suffice that his chances are better than negligible. *Ping v. National Education Ass'n*, 870 F.2d 1369, 1371 (7th Cir. 1989); *A. J. Canfield Co. v. Vess Beverages, Inc.*, 796 F.2d 903 (7th Cir. 1986); *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380 (7th Cir. 1984). The more heavily the balance of harm weighs in the plaintiff's favor, the lower the degree of likelihood of success on the merits that is required of the plaintiff. *Thornton v. Barnes*, 890 F.2d 1380, 1384 (7th Cir. 1989); *Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986); *American Hospital Supply Corp. v. Hospital Products, Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986).

If the plaintiff makes the necessary showings, the determination of whether injunctive relief should be granted rests within the court's discretion. *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429 (7th Cir. 1986).[7]

B.

The NCAA argues that Mr. Banks has not shown a likelihood of success on the merits, the court of his antitrust claim. If the court finds no likelihood of success on the merits the court should deny the preliminary

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[7] The NCAA notes that mandatory temporary injunctions compelling defendants to take affirmative action "are ordinarily cautiously viewed and sparingly issued." *Shango v. Jurich*, 681 F.2d 1091, 1097 (7th Cir. 1982); *Jordan v. Wolke*, 593 F.2d 772, 774 (7th Cir. 1979). Mr. Banks denies that he seeks a mandatory injunction. Whether the proposed injunction would be mandatory or prohibitory seems to depend upon one's perspective of the case. In any event, the court's decision does not rely on the rule set forth in *Shango v. Jurich*.

injunction. *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168 (7th Cir. 1988); *Illinois Psychological Ass'n v. Falk*, 818 F.2d 1337 (7th Cir. 1987).

1.

In its memorandum, the NCAA first argues that because the NCAA Bylaws challenged here regulate the non-commercial activities of an organization dedicated to fostering amateurism in college sports, the challenged regulations are not subject to the Sherman Act.

Mr. Banks cites a single case in support of his contention that the NCAA is subject to antitrust laws; the NCAA argues that that case may not support so broad a statement of law. In *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), the United States Supreme Court held that the NCAA's efforts to restrict the televising of college football games was subject to, and violated, the Sherman Act. The Court only found an anticompetitive effect in the NCAA television plan. The Court noted that much of the NCAA's activities have a procompetitive effect:

> What the NCAA and its member institutions market in this case is competition itself -- contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed on, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football -- college football. The identification of this "product" with an academic

> tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product", athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice -- not only the choices available to sports fans but also those available to athletes -- and hence can be viewed as procompetitive.

468 U.S. at 101-102. It does not appear, however, that this language was intended to mean that such activities are not subject to the Sherman Act. Instead, it appears that the Court was explaining its decision to apply the Rule of Reason to the television plan rather than finding it to be a *per se* violation of the Sherman Act. For example, the Court explained at a later point in the opinion:

> Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are

> challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

468 U.S. at 117. Finally, the Court concluded:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher eduction adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life.

468 U.S. at 120.

The NCAA cites *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975), in which a Northeastern University hockey player sought restoration of his eligibility for intercollegiate competition after it was discovered that he had been paid for playing hockey during five seasons before his enrollment at Northeastern. The plaintiff claimed the NCAA violated §§ 1 and 2 of the Sherman Act. The court held that the antitrust laws are aimed

primarily at combinations with commercial objectives and have limited application to other types of organizations. The student hockey player was not a "competitor" within the contemplation of the antitrust laws and had "not shown how the action of N.C.A.A. in setting eligibility guidelines ha[d] any nexus to commercial or business activities in which the defendant might engage."[8]

The Supreme Court cited *Jones* with apparent approval in *NCAA v. Board of Regents*, 468 U.S. at 102 n.24. Nonetheless, after a careful reading of *NCAA v. Board of Regents*, this court is unwilling to rely on a single district court opinion for the conclusion, sought by the NCAA, that the antitrust laws have no application to NCAA regulations concerning eligibility.

2.

The NCAA next argues that its "no draft" and "no agent" rules do not violate § 1 of the Sherman Act.

Mr. Banks contends that the Bylaws produce three different and identifiable restraints of trade. First, its members have agreed not to allow Mr. Banks and those like him ever again to play intercollegiate football for a member institution. Second, the Bylaws require all NCAA members to exclude Mr. Banks and those like him from playing football, thus directly restraining Notre Dame and indirectly restraining Mr. Banks. Third, the Bylaws

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[8] Mr. Banks has pointed to a commercial activity in which he wishes to engage: he believes that another season of football at Notre Dame would render him draft-worthy in the eyes of NFL teams in 1991. Professional football, however, is not an activity in which the NCAA purports to engage.

interfere with Mr. Banks' ability (and the ability of those like him) to make himself available for the NFL draft.

Section 1 of the Sherman Act makes it unlawful for anyone to contract, combine in the form of trust or otherwise, or conspire, in restraint of trade or commerce among the several states. 15 U.S.C. § 1. Whether a particular arrangement violates the Sherman Act depends upon the arrangement's effect upon competition in the relevant market place. *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 478 (7th Cir.), *cert. denied*, 109 S. Ct. 137 (1988). The parties agree that under *NCAA v. Board of Regents*, the court must apply the Rule of Reason to determine whether the Bylaws at issue offend the Sherman Act.

The Rule of Reason requires the court to inquire whether the agreement or action challenged as a restraint is one that promotes competition or one that suppresses competition. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 691 (1978). The plaintiff must show that the restraint has an adverse impact on the competition in the relevant market. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762 (1984). The court must determine "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

In any Rule of Reason case, the threshold issue is market power. which is the ability to raise prices above the competitive level by restricting output. *Wilk v. American Medical Ass'n*, 895 F.2d 352, 359 (7th Cir.), *cert. denied*, 110 S. Ct. 2621 (1990); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987).

Definition of the relevant market in a given case often is a challenging intellectual exercise, *see, e.g., United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990) ("It is always possible to take pot shots at a market definition"), and the challenge is no less here. Mr. Banks' brief in support of his motion attempted no such definition. In its responding brief, the NCAA hypothesized a few definitions that might apply. At oral argument, counsel for Mr. Banks stated that the market from which Mr. Banks is excluded consists of all NCAA schools: the challenged Bylaws prevent his participation in intercollegiate football at any NCAA member institution.

In additional proposed findings of facts tendered at the conclusion of the argument, Mr. Banks identified other markets, each peculiar to the three restraints identified above:

> With respect to the first claimed restraint, that imposed by the NCAA and its member institutions, prohibiting Mr. Banks and those like him from playing for any NCAA member, the relevant market is identified as "all those players who wish to play football for major college football teams, a market which is dominated by the NCAA."
>
> With respect to the second claimed restraint, which operates on NCAA member institutions by requiring them to abide by NCAA rules, Mr. Banks posits a market consisting of "all major college football institutions since all NCAA member institutions are subject to similar restrictions".[9]

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[9] The NCAA contended at oral argument that Mr. Banks would lack standing to raise an antitrust claim with respect to a restraint on Notre Dame. Although the

> With respect to the third claimed restraint, which limits to a single occasion a collegiate athlete's opportunity to make himself available for the NFL draft, Mr. Banks identifies a market "composed of players like Banks who are considering entering the NFL draft while they still have college eligibility remaining."[10]

Assuming Mr. Banks' market definition is appropriate,[11] the inquiry turns to whether the NCAA

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pressures of time did not permit full briefing and consideration of this argument, the NCAA's position on the standing issue appears to be well-taken. *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 537, 538-545 (1983); *McCormick v. NCAA*, 845 F.2d 1338, 1342-1343 (5th Cir. 1988). In any event, however, Mr. Banks has standing to raise his antitrust claims based on the other two asserted restraints.

[10] Since Mr. Banks did not propose this market definition until after the hearing, little argument was directed to it. In its brief, the NCAA addressed a variation on this market definition: the market in which amateur football players compete for openings on NFL teams. As so defined, the market would include those collegiate athletes whose eligibility has expired, as well as those with remaining eligibility. The NCAA argued that Mr. Banks was not restrained from competing on this modified market; he competed, and was not drafted, and now seeks an opportunity to return to the college football market for to make another run at the NFL market.

[11] Still other markets might be proposed. The relevant market might consist of all institutions that in any sense compensate athletes (whether through salary or grants-in-aid) for playing football. That market would consist of the NCAA and member institutions, the NFL and its

exercises market power. Unquestionably, the NCAA exercises authority over its member institutions (the relevant market) by requiring their adherence to the Bylaws. As noted above, however, market power, for antitrust purposes, is the ability to raise prices above the competitive level by restricting output. *See Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 26 (7th Cir. 1988) (Posner, J., dissenting) (market power is "the power to raise the price of its parts above the price that a competitive market would charge, without losing so many sales as to make the price increase unprofitable"). Identifying the concept of "price" in intercollegiate football is no easy matter.

Mr. Banks estimates the value of his grant-in-aid at Notre Dame at $16,000.00 per year; Notre Dame has presented nothing in opposition to that estimate. The record contains no suggestion that Mr. Banks' exclusion from the relevant market will have any impact on the value of a grant-in-aid at Notre Dame. Similarly, the record contains no suggestion that Mr. Banks' participation in, or exclusion from, intercollegiate athletics will have any impact on the value of such scholarships at other member institutions. The value of a grant-in-aid at any NCAA college or university will continue to depend upon the school's tuition, room and board charges, and other related costs, not upon whether unsuccessful

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NCAA and member institutions, the NFL and its twenty-eight teams, and the CFL and its nine teams. Or the market might be defined even more broadly as a segment of the entertainment industry; such a definition of the market would encompass minor league professional baseball, which the Supreme Court suggested might be comparable to college football. *NCAA v. Board of Regents*, 468 U.S. at 101- 102. In any event, Mr. Banks has not proposed such definitions.

aspirants to professional football remain eligible for intercollegiate football.

The record does not indicate that the price the NFL pays for incoming athletes is affected by the restraint. According to documents included within Mr. Banks' evidentiary submission, thirty-eight football players with remaining NCAA eligibility entered the NFL draft, and eighteen were drafted. Of all 335 players drafted by NFL teams in 1989, only sixty percent actually played in a league game during the 1989 season. It does not appear that the flow of players to the NFL has been so restricted as to raise prices. A less direct impact can be hypothesized: a drafted player with an option to return to college football might have heightened bargaining power in contract negotiations with the NFL team that drafted him.

Certainly, the Bylaws impact upon Mr. Banks; the collegiate market for his skills is closed to him. But the Sherman Act "protects competition, not competitors". *Indiana Grocery, Inc. v. Super Value Stores, Inc.*, 864 F.2d 1409, 1413 (7th Cir. 1989). The record contains little to support the proposition that the "no agent" and "no draft" rules injure competition within the market.

In any event, if "pricing" is translated into the terms of the supply of college football players as defined by eligibility, the NCAA and its member institutions have near-total control of the market of college players; such control might be deemed to provide more than adequate market share to constitute market power. *See generally Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987). Even if it is assumed, however, that Mr. Banks has made or could make a showing that the NCAA has market power within the meaning of antitrust analysis

(or that he would not be required to do so),[12] the Rule of Reason still would require Mr. Banks to prove that the challenged Bylaws' harmful effects on competition outweigh any beneficial effect on competition.

Mr. Banks argues that the Bylaws at issue constitute unreasonable restraints upon the activities of individuals like him (and institutions such as Notre Dame), since they are overbroad and sweep within their ambit many players who are still amateurs in every meaningful sense of the word, because they have not signed a professional athletic contract and have received nothing of value from any team, agent, or other person, except reimbursement for travel expenses to attend tryouts. He further argues that application of the "no agent" rule (Bylaw 12.3) to him is particularly unreasonable, since he did not retain an agent until after he had entered the 1990 draft.

Analysis under the Rule of Reason does not consider directly whether the challenged restraint is reasonable in the sense of being rationally related to a legitimate purpose. *Quinn v. Kent General Hospital*, 617 F. Supp. 1226, 1244 (D. Del. 1985). An inquiry so defined would be appropriate under a constitutional analysis, but *NCAA v. Tarkanian*, 488 U.S. 179 (1988), seems to foreclose a constitutional challenge, and Mr. Banks makes no constitutional claim. The antitrust inquiry is whether the restraint is anticompetitive in light of its surrounding circumstances. *NCAA v. Board of Regents of Oklahoma University*, 468 U.S. at 104; *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 268 (7th Cir. 1981), *cert. denied*, 455

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[12] Under some circumstances (not necessarily present here), an antitrust plaintiff may prevail even absent a showing of market power. *NCAA v. Board of Regents*, 468 U.S. at 109-110 and n.42.

U.S. 921 (1982). Nonetheless, the rules' relationship to their purpose is not wholly immaterial. Analysis of the effect on competition entails examination of, among other things, circumstances peculiar to the business or industry and the reason for the restraint. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Where, as here, a defendant claims to have acted with a procompetitive purpose, the challenged restraint must bear some nexus to that purpose for the claim to be credible. *See generally Wilk v. American Medical Ass'n*, 895 F.2d at 361 ("the district court found that the AMA was not motivated by such altruistic concerns").

Mr. Banks has posited a credible anticompetitive effect of Bylaw 12.2.4.2, the "no-draft" rule. College football, he suggests, is a substantial moneymaker. The "no-draft" rule will deter better college football players from testing the waters of professional football for fear of finding themselves in the no-man's land in which Mr. Banks has placed himself. Accordingly, better players will remain in school and out of the NFL draft, enhancing the NCAA's already profitable product.

In turn, the NCAA has articulated procompetitive effects of its "no-draft" rule. NCAA regulations are designed to preserve amateurism and to prevent the professionalization of college sports to the extent educational objectives would be overshadowed. If college football players could shuttle between the professional draft and their college teams, the NCAA argues, the players' profit-making objectives soon would overshadow educational objectives, blur the line between college and professional football, and create a number of potential

problems for the effective management of teams engaged in college football.[13]

The NCAA argues that because the Bylaws at issue preserve a clear line of demarcation between amateur and professional athletic pursuits, they advance the goal of focusing student-athletes' attention and energies on collegiate endeavors, both academic and athletic, and so have the procompetitive effect of promoting the integrity and quality of college-football. The NCAA contends, with some hyperbole, that without the restraints of eligibility rules, the distinct "product", college football, would not survive as an amateur sport.

Courts applying the Rule of Reason have consistently noted the procompetitive effects of NCAA eligibility regulations. The segments of the *NCAA v. Board of Regents* opinion quoted above, although dicta, speak powerfully to the procompetitive nature of NCAA regulations concerning eligibility. Further, the sentiments expressed in that dicta are in harmony with cases decided before and after *NCAA v. Board of Regents*.

In *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983), varsity football players for the University of Arizona sought to enjoin enforcement of NCAA sanctions that prohibited their school from post-season competition and

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[13] Newspaper articles submitted with the plaintiff's submission, to which the defendants made no objection, suggest that the NFL would face even more problems. According to those articles, NFL teams worry that if a player could return to college after being drafted, NFL teams would risk wasting their draft choices. It might also be assumed that such an option for drafted players would bring to contract negotiations a new development that NFL teams would find unwelcome.

television appearances. The players claimed the sanctions constituted a group boycott in violation of § 1 of the Sherman Act. Relying in part upon the NCAA's control of television bids, the court held that the Sherman Act applied to the NCAA. The court went on, however, to hold that the sanctions at issue did not violate the Sherman Act:

> The sanctions at issue in this case . . . have been shown to lack an anticompetitive purpose and to be directly related to the NCAA objectives of preserving amateurism and promoting fair competition. . . . [T]he NCAA sanction program was designed to prevent intercollegiate athletic programs from being drive by the pressures to "remain competitive" into committing practices that "threaten both the competitive and the amateur nature of the programs . . . " [*Hennessey v. NCAA*, 564 F.2d 1136, 1153 (5th Cir. 1977)]. The fact that the sanctions might have an incidental anticompetitive effect on coaches or athletes does not in itself render them unreasonable restraints under the rule of reason. . . .
>
> In sum, it is clear that the NCAA is not engaged in two distinct kinds of rulemaking activity. One type . . . is rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose. . . . The NCAA sanctions at issue here are clearly of the former variety. Because the sanctions evince no anti-competitive purpose, are reasonably related to the association's central objectives, and are not overbroad, the NCAA's action does not constitute an unreasonable restraint under the Sherman Act.

577 F. Supp. at 382-383.

In *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988), football players for Southern Methodist University sought to enjoin, as violative of § 1 of the Sherman Act, NCAA sanctions against their school; those sanctions entailed a temporary cessation of the football program. After quoting liberally from *NCAA v. Board of Regents*, the court stated its conclusion succinctly: "The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures. The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal." 845 F.2d at 1345. *Accord*, *United States v. Walters*, 711 F. Supp. 1435, 1441-1442 (N.D. Ill. 1989); *College Athletic Placement Service, Inc. v. NCAA*, 1975 Trade Cas. (CCH) ¶ 60,117 (D.N.J. 1974).

The court agrees with the holdings of these cases and with the dicta in *NCAA v. Board of Regents* and finds that reasoning equally applicable to the Bylaws at issue here. The NCAA's "no draft" and "no agent" rules are intended to preserve the intercollegiate football's amateur nature. The concept of amateurism is no less central to the concept of amateur college football than are the modest propositions that an athlete must enroll in the college for which he wishes to play, attend classes, and maintain a minimal academic standing. Each of those limitations constitute restraints with some anticompetitive nature: an NCAA member institution will be reluctant to recruit athletes it is not willing to enroll and may not allow participation by athletes to whom it is not willing to award adequate grades. Similarly, limitations upon the number of assistant coaches, *Hennessey v. NCAA*, 564 F.2d 1136, 1154 (5th Cir. 1977), have some degree of harm to competition. The procompetitive nature of the regulations, however, outweighs the anticompetitive effects.

It may be, as Mr. Banks argues, that the NCAA's "no draft" and "no agent" rules protect a flawed concept of amateurism. Whether an athlete who has received nothing more than two payments of expenses, or who asked a family friend to attempt to interest NFL teams in his services, would be perceived as a professional by the average citizen is debatable; whether the average citizen would consider a professional baseball player to be an amateur college basketball player may be less debatable. Nonetheless, the Bylaws at issue seek to define amateurism for purposes of intercollegiate athletic eligibility, and the need for such a definition is central to a procompetitive purpose. "That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable." *McCormack v. NCAA*, 845 F.2d at 1345.

The NCAA has demonstrated significant procompetitive effects and purpose of the Bylaws at issue. Mr. Banks has not shown a reasonable likelihood of demonstrating a greater anticompetitive effect. He has not demonstrated an ability to show a distortion of pricing, because a substantial number of players seeking positions on NFL rosters fail in their quest; the supply of players is more than adequate. He has demonstrated no ability to show substantial reduction in the supply of amateur players as a result of the NCAA regulations (according to his submission, twenty players with remaining collegiate eligibility made themselves available for the draft but were not drafted). He has demonstrated no harm to consumer welfare apart from the consumers' inability to see him play football this fall, a harm for which he must bear significant responsibility. Accordingly, he has not demonstrated a reasonable likelihood of success on his claim that the NCAA's regulations restrain trade in violation of § 1 of the Sherman Act.

At a comparatively young age, Braxston Banks was called upon to make a decision that would determine his chosen career. To remain an amateur would have required him to forego a possible lucrative year's salary (and a substantial portion of his career earnings as a professional football player, whose careers last only a few years) and subjected him to the risk of further, perhaps disabling injury in exchange for another year's grant-in-aid. To enter the draft would require him to surrender a grant-in-aid worth $16,000.00 and perhaps defer his postgraduate education, but an NFL running back can probably pay his own way through school. More importantly, a decision to enter the draft would risk the end of his competitive football career.

But while the court sympathizes with Mr. Banks, the NCAA regulations at issue here, whatever their wisdom or soundness as intercollegiate athletic policy, do not offend the federal antitrust laws. The court cannot rescue Mr. Banks' career hopes by holding otherwise. He has shown no likelihood of success on the merits of his federal antitrust claim, so his motion for preliminary injunction must be, and hereby is, DENIED.

SO ORDERED.
ENTERED: August 17, 1990

/s/
Robert L. Miller, Jr. , Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

BRAXTON LEE BANKS,	)	
	)	
Plaintiff	)	
	)	
vs.	)	CAUSE NO. S90-394
	)	
NATIONAL COLLEGIATE	)	
ATHLETIC ASSOCIATION,	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

Former intercollegiate football player Braxton Banks contends that the National Collegiate Athletic Association ("NCAA") violates antitrust law through rules that cost Mr. Banks his remaining year of intercollegiate eligibility when he retained an agent and entered the professional football draft. The NCAA has moved to dismiss the complaint because Mr. Banks lacks constitutional and antitrust standing to seek injunctive relief and because the complaint states no antitrust claim upon which relief can be granted.

I.

On August 17, 1990, the court denied Mr. Banks's motion for a preliminary injunction; that order and memorandum contains a detailed explanation of the relevant facts in this case, and the court incorporates that statement of essentially undisputed facts by reference and proceeds with a brief summary of those facts.

Mr. Banks is a recent graduate of and former football player at the University of Notre Dame. He originally filed this action on August 8, 1990 seeking a temporary restraining order and preliminary injunction against the NCAA and Notre Dame. He sought to return to Notre Dame's football team in the fall of 1990 for his final year of intercollegiate eligibility following his failed attempt to be drafted into the National Football League ("NFL").

NCAA rules prohibit players from returning to collegiate football after either entering the NFL draft (Rule 12.2.4) or acquiring an agent for that purpose (Rule 12.3). As a member of the NCAA, Notre Dame is bound to enforce that association's rules and was, therefore, unable to permit Mr. Banks' return to college football. To achieve his return to Notre Dame's football program, Mr. Banks filed this action challenging the NCAA's "no draft" rules and Notre Dame's enforcement of them. His complaint alleged that the no draft rules violate the federal antitrust laws, 15 U.S.C. § 1 *et seq.*

The court denied Mr. Banks' request for equitable relief, holding that Mr. Banks had shown no likelihood of success on the merits of his antitrust suit and, therefore, failed to meet the legal test for establishing the need for preliminary injunctive relief. Specifically, the court held that the purported anticompetitive effects of the challenged NCAA rules were unlikely to impact upon those relevant markets affected by such regulations (e.g., NCAA member teams and NFL teams). The August 17 order also recognized the significant pro-competitive effects of the NCAA's "no draft" and "no agent" rules on collegiate football programs. Finding no impact on market competition resulting from the NCAA no draft rules, the court determined that Mr. Banks had failed to show that his antitrust suit against the NCAA and Notre Dame had more than a negligible chance of success.

II.

Since the August 17 ruling, Mr. Banks voluntarily dismissed his claim against Notre Dame and filed an amended complaint, which sets forth two causes of action. In the first allegation, Mr. Banks seeks to bring a class action claim against the NCAA for the federal antitrust violations and seeks a permanent injunction prohibiting the NCAA's enforcement of the no draft/no agent rules pursuant to 15 U.S.C. § 26. Mr. Banks recognizes that he lacks standing to bring Count I on his own behalf, but purports to be an adequate representative of the proposed class of similarly situated collegiate players pursuant to Fed. R. Civ. p. 23(b)(2). He asserts that the Rule 23(b)(2) class consists of those football players at NCAA colleges who (a) have entered the NFL draft, or retained an agent, or both in circumstances that would violate NCAA Rules 12.2.4 and/or 12.3, or (b) are considering undertaking such conduct now, or who may consider undertaking such conduct in the future, and who wish to retain the option, denied them by NCAA Rules 12.2.4 and 12.3, of returning to play intercollegiate football at their colleges if they do not sign a professional contract. The issue of the appropriateness of certification of the above identified class is not presently before the court.

Mr. Banks brings his second cause of action solely on his own behalf. He alleges that he has incurred significant financial loss as a result of his present ineligibility from participation in collegiate football. He argues that the NCAA's no draft/no agent rules caused that loss and further that they are unreasonable restraints on trade and commerce in violation of the antitrust laws. Mr. Banks seeks an award of reasonable attorney fees in addition to compensatory damages.

The NCAA seeks dismissal of both causes of action in Mr. Banks' amended complaint. With respect to the class

count, the NCAA argues that Mr. Banks lacks standing in two respects. First, the NCAA argues that Mr. Banks lacks constitutional standing because he can show no likelihood of future injury to him as a result of the application of the challenged rules. The NCAA states that Mr. Banks' injuries are actual and not anticipated and, therefore, an injunction would not remedy his plight.

The NCAA further suggests that Mr. Banks lacks standing to seek an injunction pursuant to 15 U.S.C. § 26, the federal statute cited in the first cause of action. Again, the NCAA argues that a party must demonstrate a threatened injury, loss, or damage to seek injunctive relief under the federal antitrust laws. Since Mr. Banks can demonstrate no threat of injury to him from the NCAA's enforcement of the Rules, the NCAA contends that he cannot seek injunctive relief under the Clayton Act, 15 U.S.C. § 26.

In response to the standing issue, Mr. Banks points out that the first cause of action seeks injunctive relief only on behalf of the class and not himself. He suggests that the NCAA's standing arguments mingle issues of class certification and the appropriateness of Mr. Banks' representation of the class, which are not yet before the court for ruling. Mr. Banks suggests that one who lacks standing in his own right on a claim nonetheless may serve as an adequate class representative. Finally, he points out that he was under threat of injury when this suit was first filed and that any examination of his standing should relate back to that time.

With respect to both causes of action, the NCAA contends that Mr. Banks has failed to allege an antitrust action under 15 U.S.C. § 1 *et seq.* The NCAA argues that Mr. Banks' amended complaint brings essentially the same allegations raised in the original complaint, and that this court held earlier that Mr. Banks showed no likelihood of

success on the original complaint for violations of federal antitrust laws. The NCAA maintains that when the essential element of injury to competition is absent from the pleadings and the plaintiff's allegations, dismissal of the antitrust action is appropriate pursuant to Fed. R. Civ. P. 12(b)(6).

Mr. Banks argues that he has asserted a cognizable injury under the antitrust laws in the second cause of action of his amended complaint. He contends that the impact of the NCAA's rules cannot be resolved on a motion to dismiss since disposition of that issue is fact-sensitive. He suggests that the NCAA rules violate the antitrust laws by restricting opportunities in the labor market for collegiate football players. Mr. Banks further suggests that the rules effect a group boycott on the part of the NCAA and the NFL teams over collegiate football players as consumers in the labor market. Mr. Banks does not suggest what anti-competitive effects result from either restraints in the football labor market or the group boycott; nor does he challenge the purported pro-competitive impact of the NCAA's no draft rules.

III.

Standing is a threshold question of the court's consideration before any discussion of the claim's merits. *Stoianoff v. Montana*, 695 F.2d 1214 (8th Cir. 1983); *In re Huff*, 109 Bankr. 506 (Bankr. S.D. Fla. 1989). The NCAA asserts that Mr. Banks lacks standing to assert his injunctive claim because he lacks both constitutional standing and standing under the federal antitrust laws. The constitutional challenge must be discussed first.

Generally, a claimant must assert his own legal rights and interests and cannot rest claims for relief on the legal rights and interests of others. *Allen v. Wright*, 468 U.S. 737 (1984); *Warth v. Seldin*, 422 U.S. 490, 499 (1975);

United States v. Kerner, 895 F.2d 1159 (7th Cir. 1990); *Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150 (7th Cir. 1990). Congress confers rights to bring actions upon certain parties regardless of that personal involvement or injury necessary to establish standing to bring a lawsuit on that party's own behalf. *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990); *United States v. SCRAP*, 412 U.S. 669 (1972).

Federal Rule of Civil Procedure 23 provides such a congressionally recognized exception to the general constitutional restrictions on standing. While an individual may lack standing to pursue legal relief (including injunctive relief) for want of a threat of injury or loss to him, the individual may, under appropriate circumstances, serve as a representative for a class of persons who have standing to bring that claim for relief. *Sosna v. Iowa*, 419 U.S. 393, 399 (1975); *Gerstein v. Pugh*, 420 U.S. 103 (1974). This exceptional doctrine has been applied in the context of class action suits when a named plaintiff, whose individual claims have become moot, continues to act as a class representative. *United States Parol Commission v. Geraghty*, 445 U.S. 388, 398-99 (1990); *Swisher v. Brady*, 445 U.S. 204, 214 (1978).

When this action was filed in early August, 1990, Mr. Banks sought to return to Notre Dame as a football player despite the NCAA's rules prohibiting his return. Until practice for the 1990 season commenced later that month, Mr. Banks was not injured by Notre Dame's enforcement of the NCAA rules and rejection of his offer to return. Mr. Banks' case falls into that exceptional area in which though a plaintiff's individual claims have become moot, the claims of the class he purports to represent survive. *Holmes v. Fisher*, 854 F.2d 229, 232 (7th Cir. 1988); *Davis v. Ball Memorial Hospital Ass'n*, 753 F.2d 1410 (7th Cir. 1985); *Trotter v. Klincar*, 748 F.2d 1177 (7th Cir. 1984).

The NCAA argues that this exception to constitutional standing in class action suits applies only when the claim asserted is "capable of repetition, yet evading review." However, the Seventh Circuit has explicitly noted that this is not a prerequisite for application of the exception, *Trotter v. Klincar*, 748 F.2d at 1183, a holding compelled by recognition that the plaintiff's claim would not be rendered moot and, hence, would rely on the class which he represents if his action were in itself "capable of repetition, yet evading review." *See also McKenzie v. Crotty*, 738 F. Supp. 1287, 1289-90 (D.S.D. 1990).

The issue of class certification in this cause is not yet before the court, and the court need not, at this stage, assess Mr. Banks' ability to represent the purported class. However, despite the uncertainty of the claims of the class, the court need not rely on the class to find standing to maintain the action. Mr. Banks has established the threat of injury to him at the time the suit was filed; this is sufficient, at least for the time being, to avoid dismissal of the cause for want of constitutional standing.

With respect to the NCAA's contention that Mr. Banks lacks standing to seek injunctive relief in his first cause of action, the court sides with the plaintiff. The first cause of action addresses injuries that may be incurred by the class and not by Mr. Banks. Accordingly, until this court certifies the class and determines the parameters of those parties' claims, there is no basis for dismissing this action for failure to assert a right to injunctive relief pursuant to 15 U.S.C. § 26.

IV.

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of complaints that state no actionable claim. The complaint's factual allegations must be taken as true and viewed in the light most favorable to the plaintiff.

Scheuer v. Rhodes, 416 U.S. 232 (1974); *Brown v. City of Lake Geneva*, 919 F.2d 1299, 1300 (7th Cir. 1990). Dismissal is appropriate if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Conley v. Gibson*, 355 U.S. 41 (1957); *Gregory v. Nunn*, 895 F.2d 413, 414 (7th Cir. 1990); *Gold v. Wolpert*, 876 F.2d 1327, 1329 (7th Cir. 1989) (dismissal appropriate if complaint "failed to allege any set of facts on which relief could be granted").

The NCAA argues that dismissal is warranted based on the face of the amended pleadings and the August 17 order. Applying the "rule of reason" in antitrust cases (as this court has done with the parties' acquiescence), the NCAA states that Mr. Banks has yet to assert facts giving rise to an anti-competitive market impact sufficient to support his claim. This court agrees.

Section 1 of the Sherman Act makes it unlawful for a person or entity to contract, combine in the form of trust or otherwise, or conspire in restraint of trade or commerce among the several states. 15 U.S.C. § 1. To determine whether Mr. Banks has stated a claim for relief under this statute, the court must examine whether the challenged NCAA rules exact an anti-competitive impact on the market of collegiate football players and NCAA institutions. *NCAA v. Board of Regents*, 468 U.S. 85 (1984). The August 17 order provided a detailed outline of the applicable law on this issue. The parties have come forward with no new precedent to add to that discussion, so the court need not repeat those rules here.

The amended complaint did not significantly change the allegations under the antitrust laws, and on August 17, the court held that the original complaint was insufficient to show any likelihood of success on the merits. However, the present task is to determine whether, despite the

failure to show a likelihood of success on the merits, Mr. Banks has presented a claim upon which relief could be granted under the antitrust laws.

Mr. Banks primarily argues that dismissal is inappropriate until discovery proceeds and facts supporting the claim are determined. However, this court need defer ruling on the dismissal motion if factual proof would not save the complaint. Courts adjudicating antitrust claims have dismissed complaints prior to trial where the factual allegations themselves do not support an injury in competition to the market place. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1109 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983).

Mr. Banks' amended complaint fails to allege facts establishing the NCAA's violation of the antitrust laws. As discussed in the August 17 order, the NCAA has demonstrated significant procompetitive effects of its no draft rules. Mr. Banks has alleged no anti-competitive effects to overcome this positive impact and show an adverse market impact upon either collegiate players or NCAA member institutions. As discussed in the August order, the rules effect neither the players' ability to receive financing for their education nor the schools' opportunity to compete for athletes. While Mr. Banks claims that the NCAA rules in question accomplish a group boycott by way of restricting the football labor market, he ties those allegations to no competitive impact on any identifiable market. Mr. Banks has no antitrust injury that can be gleamed from the amended complaint.

V.

For the reasons stated above, the court hereby GRANTS the NCAA's motion to dismiss on both causes

of action raised in the amended complaint of plaintiff Braxton Banks and ORDERS this cause DISMISSED.

SO ORDERED.

ENTERED: February 20, 1991

/S/
Robert L.Miller, Jr., Judge
United States District

cc: Masters/Donnelly
Morrison
Barnard/Lynch/Reindl
Kitchin
Order book

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 10, 1992

Before
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

BRAXSTON L. BANKS, Plaintiff-Appellant,	] Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 91-1666 v.	]
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant-Appellee.	] No. 90 C 394 Robert L. Miller, Jr., Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon,** and a majority of the judges on the original panel have voted to deny a rehearing.*** Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*The Honorable Robert A. Grant, of the Northern District of Indiana, sitting by designation.

**Judge Ripple took no part in consideration or decision of this matter.

***Judge Flaum voted to grant a rehearing.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
(SOUTH BEND DIVISION)

BRAXSTON LEE BANKS	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. S90-00394
	)	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,	)	
	)	
Defendant.	)	

AMENDED COMPLAINT -- CLASS ACTION

1. This is a class action challenging two rules of the defendant National Collegiate Athletic Association ("NCAA") on the ground that they violate the Sherman Antitrust Act, 15 U.S.C. § 1: (a) the rule making a player ineligible for further intercollegiate play, once he asks that his name be put into the professional draft, even if he is not drafted and does not sign a professional contract, and (b) the rule making a player ineligible for further intercollegiate play, once he retains an agent or attorney to represent him, even if he never signs a professional contract or receives any money, directly or indirectly, from the agent or attorney.

Parties and Jurisdiction

2. Plaintiff Braxston Lee Banks has been attending the University of Notre Dame ("Notre Dame") on a full grant-in-aid, which is worth approximately $16,000 per year. He played running-back on the Notre Dame football team for three years. He has recently completed his

undergraduate education, but he would have been eligible to return to Notre Dame for a fifth year of studies, continue his grant-in-aid, and be eligible for one more year of intercollegiate football, but for the activities of defendant NCAA described in this complaint.

3. The defendant NCAA is an association of approximately 1017 colleges and universities, including Notre Dame, whose purpose is to promote intercollegiate athletics in the United States.

4. Because plaintiff seeks injunctive relief and damages under the antitrust laws, this Court has jurisdiction pursuant to 15 U.S.C. §§ 15 and 26.

Background

5. There are approximately 187 colleges throughout the United States that play intercollegiate football and that are members of the NCAA. It is the dominant association of colleges and universities that engage in intercollegiate athletics.

6. The NCAA has adopted a series of substantive rules that relate to all intercollegiate sports, including football, and to which all of its members have agreed, and do in fact, adhere. The NCAA has also adopted rules and procedures for the enforcement of its substantive rules, including the sanctioning of members who do not adhere to its rules.

7. Because of its national membership and its control over intercollegiate football, the NCAA and the rules that it has adopted and enforces have a substantial effect on intercollegiate and professional football and, therefore, on interstate commerce.

8. Among the rules referred to in paragraphs 6 and 7 above are the two rules being challenged in this case: Rules 12.2.4 and Rule 12.3, copies of which are attached to this complaint.

9. Rule 12.2.4 makes any player ineligible for participation in any future intercollegiate sport in which that player asks that his or her name be placed on a list of players available for the professional draft in that sport. The Rule applies even if the player asks that his or her name be withdrawn before the draft starts, the player goes through the draft but is not chosen, or the player is drafted, but does not sign a professional contract. The Rule does not apply to a player who is a paid professional athlete in one sport, but wishes to play intercollegiate athletics in another.

10. Rule 12.2.4 imposes a direct and unjustifiable barrier against athletes exploring the market for their abilities among professional sports teams. The Rule affirmatively benefits the member schools of the NCAA by encouraging athletes with the potential to play professional sports to remain in intercollegiate sports and by preventing athletes from obtaining information concerning how professional teams view their abilities.

11. Rule 12.3 makes any player ineligible for participation in any future intercollegiate sport in which that player agrees (orally or in writing) to be represented by an agent, which includes an attorney, for the purpose of marketing that player's athletic ability or reputation in that sport. The Rule applies even if the player receives no money or financial benefit from the agent or anyone else, even if the agent is a close friend or family member, and even if the agent has not charged and agrees not to charge the player any fee for the representation. There is a limited exception for lawyers, but not other agents, but even that exception is available only for advice concerning

a proposed professional sport contract, and it does not apply if the lawyer is present in the room during contract negotiations or has any direct contact with any professional sports organization on behalf of the player. The Rule does not apply to a player who has retained an agent for one sport, but who wishes to play in another.

12. A player's decision on whether to turn professional before his eligibility is concluded is a very difficult one for any player to make. Part of that difficulty is based on the player's lack of information as to how the professional teams evaluate his abilities, because that information is generally available only to agents and others with close contacts with professional teams.

13. Aside from the lack of specific information about the level of interest in a particular player, most players are unsophisticated in general and in particular lack experience in making decisions of this kind. In addition, most players are unaware, whereas most agents are aware, of the various alternatives to turning professional early that will protect players financially against career-ending injuries, such as insurance financed by a bank, which is secured by the proceeds from the policy.

14. Because of the importance of the decision on whether to turn professional, and because most players need information and advice, impediments such as Rule 12.3 to obtaining the assistance of others, particularly agents who are familiar with the market for professionals athletes and with the availability of various options, seriously undermine the ability of most players to make the best choice about whether to enter the draft early.

15. Despite the great need that most players have for the advice of an agent prior to deciding whether to enter the draft, NCAA Rule 12.3, including the manner in which it is administered and construed, both by the NCAA and

by its members with football teams, not only directly forbids a player from retaining an agent, but creates such a substantial risk of being found to have retained an agent merely by talking to one, that it deters most players from contacting an agent, even for obtaining needed and, in some cases, permissible advice, before deciding whether to enter the draft early.

16. Rules 12.2.4 and 12.3, like all other NCAA Rules, have been enforced in the past and will be enforced in the future against any player who violates them. In addition, with respect to the anti-agent Rule (12.3), the NCAA and its member schools routinely warn players of the import of the Rule, generally in a way that suggests that any contact with any agent before a player completes his or her eligibility will result in immediate loss of eligibility. As a result, although there are a few contacts between players and agents that are not forbidden by Rule 12.3, many players believe that all such contacts are prohibited until the player completes his or her eligibility.

Facts Relating to Plaintiff Banks

17. The most recent annual draft of the National Football League ("NFL") was held on April 22-23, 1990. In order to be eligible for that draft, a player had either to have completed his eligibility or filed a declaration of his intent to enter the draft and forego any remaining eligibility by March 22, 1990.

18. Plaintiff Banks, along with 37 other players who had further football eligibility remaining, declared themselves for the April 1990 draft. Of those 38 players, 20 were not drafted by any team, including plaintiff Banks. Of those who were not drafted, several have since signed on as free agents, have decided to play football in Canada, or have decided not to play football further.

19. At the time that this action was commenced, plaintiff Banks had decided not to try to play professional football in 1990 but instead wished to return to Notre Dame to continue his education, to play for another year, and to reenter the draft in 1991. Prior to deciding to enter the draft, plaintiff Banks had applied to Notre Dame to continue his full grant-in-aid for an additional year of study and football eligibility, and Notre Dame had approved his application.

20. As a result of the operation of NCAA Rule 12.2.4, plaintiff Banks became ineligible for further intercollegiate football competition. In addition, because plaintiff Banks was represented by an attorney after entering the 1990 NFL draft, he also became ineligible as a result of the operation of NCAA Rule 12.3. But for the operation of Rules 12.2.4 and 12.3, Notre Dame would have admitted plaintiff Banks for another year of education on a full grant-in-aid, and he would have been eligible to play on the Notre Dame football team during the 1990 season.

21. With the filing of the complaint in the action, plaintiff Banks filed a motion for a preliminary injunction seeking an order that would have prevented the NCAA and Notre Dame from denying him his eligibility on account of the operation of Rules 12.2.4 and 12.3. That motion was denied on August 17, 1990, and plaintiff Banks no longer seeks a court order that would permit him to return to Notre Dame for another year of education on a full grant-in-aid and an opportunity to play football for Notre Dame again.

22. Rules 12.2.4 and 12.3 of the NCAA operate as restraints on trade in several separate but related ways, including but not limited to,

(a) First, there is the restraint imposed by the NCAA on all of its member institutions that restricts them from

offering a player such as Banks, who enters the draft and/or retains an agent, an opportunity to play college football again. The relevant market on which that restraint is imposed is all those players who wish to play football for major college football teams, a market which is dominated by the NCAA.

(b) Second, the Rules operate as a restraint on all members of the NCAA requiring them to abide by the Rules, and not to change them or grant waivers from them. This restraint operates directly on member institutions such as Notre Dame and indirectly, although intentionally, on players such as Banks. The relevant market is all major college football institutions since all NCAA member institutions are subject to similar restrictions, and hence players like Banks are foreclosed from choosing a major college football team based on the willingness of the institution to waive or change its rules, or consider doing so.

(c) The Rules also operate to restrain the ability of a player such as Banks from marketing his services to the NFL, by effectively giving him one and only one realistic chance to be drafted by the NFL. The relevant market being restrained is composed of players like Banks who are considering entering the NFL draft while they still have college football eligibility remaining.

Class Action Allegations

23. In addition to representing himself, plaintiff Banks seeks in the first cause of action to represent a class of similarly situated players under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

24. The class consists of those football players at NCAA colleges who either (a) have entered the NFL draft, or retained an agent, or both, in circumstances that

would violate NCAA Rules 12.2.4 or 12.3, or both, or (b) are considering undertaking such conduct now, or who may consider undertaking such conduct in the future, and who wish to retain the option, denied to them by NCAA Rules 12.2.4 and 12.3, of returning to play intercollegiate football at their colleges if they do not sign a professional contract.

25. The class is so numerous that joinder of all members is impracticable. Although the number of class members who entered the 1990 NFL draft and who wished to regain their collegiate eligibility is very small and would not require class certification, the class also includes hundreds or perhaps thousands of other players who are contemplating conduct that may violate Rules 12.2.4 or 12.3, of which there will be a significant number each year for the foreseeable future. None of those players can be joined because they cannot now be identified. In addition, many of those who are now, or who may in the future be, contemplating such conduct do not wish to identify themselves publicly until they have made their decisions to enter the draft.

26. There are common questions of fact relating to the operation and effects of Rules 12.2.4 and 12.3, and common questions of law relating to the legality under the antitrust laws of their adoption and enforcement by the NCAA, that apply to every member of the class.

27. The claim of plaintiff Banks is typical of those of the class as a whole. Even though plaintiff Banks has publicly acted in ways that have caused him to lose his eligibility because of Rules 12.2.4 and 12.3, whereas the other class members either have not publicly done so, or have not done so at all, the claim of plaintiff Banks is typical of those of the class as a whole since the relief that all class members seek is the option of not forfeiting their eligibility to play intercollegiate football because of a

decision to enter the draft or to retain an agent, as long as they do not sign a professional contract.

28. Plaintiff Banks, as class representative, will fairly and adequately protect the interests of all members of the class. He is dedicated to pursuing this action on behalf of the class even though he will not play intercollegiate football again because he wants Rules 12.2.4 and 12.3 eliminated for others as well as himself. He has retained experienced class counsel to provide the class with appropriate legal representation.

29. Certification of the class under Rule 23(b)(2) is appropriate, since by adopting and enforcing Rules 12.2.4 and 12.3, defendant NCAA has acted on grounds generally applicable to all class members, thereby making final injunctive relief appropriate with respect to the class as a whole.

First Cause of Action (Class Members)

30. As result of the operation of Rules 12.2.4 and 12.3, the members of the plaintiff class, have been, or will be, put to an unlawful choice: either (a) they must forego the opportunity to explore their career options in professional football until their eligibility is concluded, by refraining from retaining an agent and/or by refraining from putting their names in the draft, or (b) if they retain an agent and/or put their names in the draft, they will, if detected, lose all of their future eligibility for intercollegiate football.

31. The adoption and enforcement by the NCAA of Rules 12.2.4 and 12.3 and their application to the members of the plaintiff class constitute a group boycott and/or other form of contract, combination, or conspiracy, that unreasonably restrains trade or commerce among the several states as more fully described in paragraph 22 above. Such restraints are in violation of 15 U.S.C. § 1

because those Rules are not reasonably necessary to advance any legitimate purpose of the NCAA and because all of the purposes which the NCAA has ascribed to those Rules can be achieved with Rules that impose far less restrictive restraints on the members of the plaintiff class than do present Rules 12.2.4 and 12.3. But for those Rules, the members of the plaintiff class who enter the draft and/or retain an agent, but who do not sign professional contracts, would be eligible to play intercollegiate football at their colleges or at other NCAA colleges that would compete for their services.

32. Unless this Court enjoins the defendant NCAA from enforcing Rules 12.2.4 and 12.3, the members of the plaintiff class will be irreparably injured by being forced to the unlawful choice described in paragraph 30.

33. Because members of the plaintiff class are or will be suffering irreparable injuries based on defendant NCAA's violation of 15 U.S.C. § 1, they are entitled to an injunction against the NCAA under 15 U.S.C. § 26.

Second Cause of Action (Plaintiff Banks Only)

34. As a result of the operation of Rules 12.2.4 and 12.3, plaintiff Banks is now ineligible to play intercollegiate football at Notre Dame or at any other NCAA institution. Because of this ineligibility, he is not eligible for a further grant-in-aid from Notre Dame.

35. The adoption and enforcement by the NCAA of Rules 12.2.4 and 12.3 and their application to plaintiff Banks constitute a group boycott and/or other form of contract, combination, or conspiracy that unreasonably restrains trade and commerce among the several states, as more fully described in paragraph 22 above. Such restraints are in violation of 15 U.S.C. §1 because those Rules are not reasonably necessary to advance any

legitimate purpose of the NCAA, and because all of the purposes which the NCAA has ascribed to those Rules can be achieved with Rules that impose far less restrictions restraints on plaintiff Banks than did present Rules 12.2.4 and 12.3. But for those Rules plaintiff Banks would have been eligible to play football for Notre Dame in 1990 and would have received a renewal of his full grant-in-aid for another year.

36. Plaintiff Banks has sustained substantial damages as a result of being denied further eligibility for intercollegiate football pursuant NCAA Rules 12.2.4 and 12.3. These include the loss of his grant-in-aid worth approximately $16,000 for another year, the value of the extra year of education, and the value of another year of football eligibility at Notre Dame.

37. Because plaintiff Banks has suffered those damages as a result of the NCAA's violations of 15 U.S.C. §§ 15 and 26, he is entitled to recover threefold the amount of those damages, pursuant to 15 U.S.C. § 15.

WHEREFORE, plaintiff prays that this Court

(1) Certify the plaintiff class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure;

(2) Permanently enjoin defendant NCAA from enforcing any provision of NCAA Rules 12.2.4 and 12.3 with respect to any member of the plaintiff class, or encouraging any other person to enforce or abide by those Rules;

(3) Award plaintiff Braxston Lee Banks threefold the amount of his damages;

(4) Grant plaintiff a reasonable attorney's fee against defendant NCAA pursuant to 15 U.S.C. §§ 15 and 26; and

(5) Grant plaintiff such other and further relief as may be just and proper.

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No. 92-1466

IN THE

Supreme Court of the United States

October Term, 1992

BRAXSTON LEE BANKS,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

The questions presented by the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, dated March 10, 1993 ("Petition"), do not accurately reflect the decision of the appellate court reprinted at Petitioner's Appendix. The judgment of the court of appeals did not rest on a conclusion that Respondent's eligibility rules for student-athletes were procompetitive, nor did the appellate court base its ruling that Petitioner's claim for an injunction was moot on facts not before that court. Rather, the judgment of the appellate court was based on its determination that Petitioner's Amended Complaint failed to allege an essential element of his cause of action and, as to its ruling on mootness, on facts contained in Petitioner's own pleadings. Accordingly, the questions presented for review are:

1. Is dismissal of a rule of reason complaint under Section 1 of the Sherman Act, 15 U.S.C. § 1, for failure to state a claim on which relief can be granted proper when the complaint fails to allege, either directly or inferentially, an injury to competition in any relevant market?

2. Does a plaintiff whose own claim is moot have constitutional standing to seek injunctive relief on behalf of a class that has never been certified when the plaintiff had almost four months to file his lawsuit and seek class certification before his claim became moot?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
1. Factual Background	2
2. Proceedings in the Lower Courts	4
REASONS WHY THE PETITION SHOULD BE DENIED	7
I. THE SEVENTH CIRCUIT DID NOT RULE THAT NCAA ELIGIBILITY RULES ARE "IMMUNE TO ANTITRUST CHALLENGE," BUT ONLY THAT THE PETITIONER IN THIS CASE FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF HIS CAUSE OF ACTION	7
II. THE SEVENTH CIRCUIT'S ANALYSIS OF THE ESSENTIAL ELEMENTS OF A RULE OF REASON CLAIM IS CONSISTENT WITH THE OPINIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS AND DOES NOT CONSTITUTE A QUESTION MERITING REVIEW ON CERTIORARI	10
III. NEITHER LOWER COURT IMPROPERLY WEIGHED THE PROCOMPETITIVE EFFECTS OF NCAA ELIGIBILITY RULES ON A MOTION TO DISMISS	16

IV. THE SEVENTH CIRCUIT'S HOLDING THAT BANKS LACKED STANDING BECAUSE HIS CLAIM FOR INJUNCTIVE RELIEF ON BEHALF OF AN UNCERTIFIED CLASS WAS MOOT WAS COMPELLED BY THE UNAMBIGUOUS RULINGS OF THIS COURT 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

American Standard Life & Accident Ins. Co. v. U.R.L., Inc., 701 F.Supp. 527 (M.D.Pa. 1988) 12, 18

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 13

Boris v. United States Football League, 1984-1 Trade Cas. (CCH) ¶ 66,012 (C.D. Cal. 1984) 13, 14

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 12

Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983) 11

Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985)..... 11, 18

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)..... 5

College Athletic Placement Serv., Inc. v. NCAA, 1975 Trade Cas. (CCH) ¶ 60,117 (D.N.J.), *aff'd*, 506 F.2d 1050 (3d Cir. 1974)..... 10

Denver Rockets v. All-Pro Management, Inc., 325 F.Supp. 1049 (C.D. Cal.), *injunction reinstated*, 401 U.S. 1204 (1971)..... 13, 14

Five Smiths, Inc. v. National Football League Players Ass'n, 788 F.Supp. 1042 (D. Minn. 1992)..... 12, 18

Gaines v. NCAA, 746 F.Supp. 738 (M.D. Tenn. 1990).. 9, 10

Garshman v. Universal Resources Holding Inc., 824 F.2d 223 (3d Cir. 1987) 11, 18

Havoco of America v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980)..... 11, 18

Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977).... 10

Hennessy Indus. v. FMC Corp., 779 F.2d 402 (7th Cir. 1985)..... 11, 18

Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984)..... 13

Jones v. NCAA, 392 F.Supp. 295 (D. Mass. 1975) 10

Justice v. NCAA, 577 F.Supp. 356 (D. Ariz. 1983) 9, 10

Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504 (9th Cir. 1989)..... 11, 18

Linseman v. World Hockey Ass'n, 439 F.Supp. 1315 (D. Conn. 1977)..... 13, 14

McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) .. 9, 10

NCAA v. Board of Regents, 468 U.S. 85 (1984).. 10, 12, 13, 16

Nichols v. Spencer International Press, Inc., 371 F.2d 332 (7th Cir. 1967)..... 15

Radovich v. National Football League, 352 U.S. 445 (1957)..... 15

Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484 (8th Cir. 1985)..... 11, 18

Retail Service Assocs. v. ConAgra Pet Products Co., 759 F.Supp. 976 (D. Conn. 1991)..... 12, 18

United States v. Brown University, 805 F.Supp. 288 (E.D. Pa. 1992), *appeal filed*, (3d Cir.)..... 14

United States v. Walters, 711 F.Supp. 1435 (N.D. Ill. 1989)..... 9, 10

United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) 18

STATUTES

15 U.S.C. § 1 ..... 2, 4
15 U.S.C. § 26 ..... 5, 7

No. 92-1466

IN THE

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BRAXSTON LEE BANKS,

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v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Contrary to Petitioner's assertions, the United States Court of Appeals for the Seventh Circuit did not hold that the eligibility rules of Respondent National Collegiate Athletic Association ("NCAA") are immune to antitrust scrutiny or exempt from the Sherman Act. Nor did the appellate court hold that the procompetitive effects of these eligibility rules outweigh

any anticompetitive effects. The Seventh Circuit merely held that, in this case, Petitioner's antitrust challenge to two of those rules was correctly dismissed because Petitioner failed to allege or explain how those rules injured competition in any relevant market. This decision is consistent with this Court's pronouncements that the focus of a rule of reason inquiry under Section 1 of the Sherman Act, 15 U.S.C. § 1, is injury to competition in the market and with numerous lower court decisions dismissing rule of reason complaints that fail to allege this essential element. There is thus no basis for granting a writ of certiorari.

1. Factual Background

The NCAA is a private, voluntary, unincorporated association of over one thousand members, primarily colleges and universities. Petitioner's Appendix ("Pet. App.") at 42a. According to its constitution, the NCAA's purpose is to promote intercollegiate athletics and to maintain amateur intercollegiate athletics "as an integral part of the educational program and the athlete as an integral part of the student body and by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." *Id.* Approximately 187 colleges that play intercollegiate football are members of the NCAA, among them the University of Notre Dame ("Notre Dame"). *Id.*

The NCAA Bylaws, enacted by its members, regulate eligibility for participation in intercollegiate athletics at member colleges and universities. *Id.* In this case, Petitioner Braxston Banks challenged two of these Bylaws, Bylaw 12.2.4.2, the "no draft" rule, which makes an athlete ineligible for further intercollegiate play in any sport in which he has entered a professional draft, and Bylaw 12.3, the "no agent" rule, which makes an athlete ineligible for further intercollegiate play in any sport for which the athlete has retained an agent to market his services. *See id.* at 42a n.1, 43a n.2. Contrary to Banks's statement in his Petition ("Pet.") at 2, the no agent rule does not preclude an athlete from soliciting advice about his professional

marketability or about a proposed professional contract. This rule applies only when an agent *represents* an athlete for the purpose of marketing his services. *See* Pet. App. at 43a n.2.

Banks entered Notre Dame on a full grant-in-aid, worth approximately $16,000.00 per year, in September 1986. *Id.* at 44a. After playing football for three seasons, he elected to sit out his senior year, the 1989 season, because of a knee injury, although the Notre Dame trainer had released him to play. *Id.* at 45a. Despite having sat out the season, Banks decided not just to make inquiries (as permitted by the no agent rule), but to enter the National Football League ("NFL") draft the following spring, knowing that this decision would render him ineligible to play football again at Notre Dame. *Id.* at 46a-47a. After entering the draft, Banks retained a family friend and sports attorney who actively marketed Banks's services to NFL teams. *Id.* at 47a-48a. Banks demonstrated his prowess to virtually any NFL team that was interested and also attended the NFL annual tryout combine in Indianapolis, at which players display their skills to all NFL teams. *Id.* at 48a. When the draft was held on April 22 and 23, 1990, Banks was not selected by any NFL team, making him a "rookie free agent" in the NFL, free to contract with any of its 28 teams. *Id.* However, no team offered Banks a contract. *Id.* at 48a-49a.

Banks returned to Notre Dame during the summer of 1990 and graduated with a bachelor's degree in August 1990. *Id.* at 49a. He also tried to arrange to play out his fifth year of college football eligibility during the 1990 season. Banks's statement that a group boycott "enforced" by the NCAA prevented him from doing so is incorrect. Pet. at 8. The NCAA did nothing as to Banks other than inform him that it could not consider his request to restore his eligibility because such a request must come from a member institution. Pet. App. at 50a. Notre Dame declined to petition the NCAA to restore Banks's eligibility. *Id.*

2. Proceedings in the Lower Courts

Banks filed this lawsuit on August 9, 1990, claiming that these two NCAA eligibility rules effected a group boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and seeking a preliminary injunction. After a hearing, the district court denied Banks's request for injunctive relief, finding that Banks had shown "no likelihood of success on the merits of his federal antitrust claim . . . ." Pet. App. at 68a.

Banks did not appeal this ruling, but filed an Amended Complaint seeking an injunction on behalf of a class of college football players (but not himself), and treble damages for himself. By this time, Banks had decided, for personal reasons, that he no longer wanted to play football for Notre Dame. Pet. at 7. Banks's statements in his Petition at 8 are a creative redrafting of the portion of his Amended Complaint that Banks contends adequately alleges an antitrust violation. In fact, the Amended Complaint states:

> (a) First, there is the restraint imposed by the NCAA on all of its member institutions that restricts them from offering a player such as Banks, who enters the draft and/or retains an agent, an opportunity to play college football again. The relevant market on which that restraint is imposed is all those players who wish to play football for major college teams, a market which is dominated by the NCAA.
>
> (b) Second, the Rules operate as a restraint on all members of the NCAA requiring them to abide by the Rules, and not to change them or grant waivers from them. This restraint operates directly on member institutions such as Notre Dame and indirectly, although intentionally, on players such as Banks. The relevant market is all major college football institutions since all NCA [sic] member institutions are subject to similar restrictions, and hence players like Banks are foreclosed from choosing a major college football team based on the willingness of the institution to waive or change its rules, or consider doing so.

> (c) The Rules also operate to restrain the ability of a player such as Banks from marketing his services to the NFL, by effectively giving him one and only one realistic chance to be drafted by the NFL. The relevant market being restrained is composed of players like Banks who are considering entering the NFL draft while they still have college football eligibility remaining.

Pet. App. at 85a-86a.

The NCAA moved to dismiss Banks's Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The NCAA argued first that Banks lacked *constitutional* standing to seek an injunction because, in light of his decision not to return to college football, he would never again be affected by the NCAA rules he challenged. *Id.* at 72a. The NCAA's second argument, that Banks lacked *antitrust* standing to seek an injunction, was also directed solely to *Banks's* claim for an injunction, although Banks has persistently mischaracterized this argument as a challenge to athletes' antitrust standing in general. *See* Pet. at 20.[1] In fact, the NCAA argued that Banks lacked standing to seek an injunction pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, because he was no longer *threatened* with antitrust injury, invoking the principle established by this Court in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986). Indeed, Banks was no longer threatened with *any* injury by the rules he challenged. Third, the NCAA argued that Banks's entire Amended Complaint should be dismissed because he failed to allege, either directly or inferentially, an injury to the process of competition in any relevant market. Pet. App. at 73a.

[1]Because the NCAA never argued that student-athletes in general lack antitrust standing, Banks's entire argument at pp. 20-21 of his Petition, including his citation to Areeda and Turner on standing, is irrelevant. The NCAA instead argued that, in general, Banks's cause of action had a far more fundamental flaw — he failed to allege an antitrust violation in the first instance.

The district court, misreading Seventh Circuit precedent on constitutional standing, ruled that since Banks had been threatened with injury when his initial Complaint was filed, "this is sufficient, at least for the time being, to avoid dismissal of the cause for want of constitutional standing." *Id.* at 75a. However, the district court agreed with the NCAA that Banks had failed to allege that the no draft and no agent rules had any "competitive impact on any identifiable market" and dismissed his Amended Complaint. *Id.* at 77a.[2]

Banks appealed to the Seventh Circuit, contending that the district court had improperly weighed the procompetitive effects of the no draft and no agent rules in deciding the motion to dismiss and that since other athletes excluded from teams by league rules stated a claim under the antitrust laws, he did too. The Seventh Circuit found that, contrary to Banks's contention, "The district court decided the case *not* on the basis of the relative anti-competitive effect of the rules versus the pro-competitive impact, but on the ground of Banks' absolute failure to allege an anti-competitive effect . . . ." *Id.* at 10a.[3] Applying established precedent, the Seventh Circuit held that Banks's Amended Complaint had been correctly dismissed

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[2]Banks states several times in his Petition that the district court found an "anticompetitive effect." *See* Pet. at 6-7, 14 n.6, 23. However, this "finding" was in the district court's ruling on preliminary injunction. *See* Pet. App. at 63a. When the district court later granted the NCAA's motion to dismiss, the district court referred to its earlier ruling:

> Specifically, the court held that the purported anticompetitive effects of the challenged NCAA rules were unlikely to impact upon those relevant markets affected by such regulations (e.g., NCAA member teams and NFL teams).

Id. at 70a. The district court went on to decide that Banks had failed to allege "an anti-competitive market impact sufficient to support his claim." *Id.* at 76a.

Moreover, the purported "anticompetitive effect" touted by Banks — that the no draft rule deters college players from entering the draft — does not support his claim, for it is obvious that Banks was not deterred. He entered the NFL draft, he retained an agent to market his services, he talked to NFL scouts, and he demonstrated his skills for any NFL team that was interested. *Id.* at 2a-4a.

[3]All emphasis in this Brief is supplied unless otherwise indicated.

because he failed to explain how the two rules he challenged injured competition in any relevant market. *Id.* at 27a. Judge Flaum in dissent agreed that Banks was required to allege an injury to competition, but found the missing element by equating the no draft rule with "price" in a college football labor market. *Id.* at 28a, 31a-32a.

On the constitutional standing issue, the Seventh Circuit held that the district court should have dismissed Banks's claim for an injunction as moot, reasoning that since Banks had had nearly 120 days between the NFL draft and the start of Notre Dame fall practice in which to file his complaint and seek class certification, his claim was not so fleeting or transitory as to qualify for a narrow exception to mootness in the class action context. *Id.* at 9a. In light of its ruling on the constitutional standing issue, the Seventh Circuit did not address the NCAA's argument that Banks also lacked antitrust standing to seek an injunction pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26. *Id.* at 7a n.6. The Seventh Circuit denied Banks's petition for rehearing with suggestion for rehearing en banc on December 10, 1992. *Id.* at 79a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE SEVENTH CIRCUIT DID NOT RULE THAT NCAA ELIGIBILITY RULES ARE "IMMUNE TO ANTITRUST CHALLENGE," BUT ONLY THAT THE PETITIONER IN THIS CASE FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF HIS CAUSE OF ACTION.

Banks contends that his case is so special and so important as to warrant review on certiorari because the Seventh Circuit has precluded review of any NCAA rules under the antitrust laws. Banks states that the Seventh Circuit held:

- that "'eligibility rules' that restrict the terms on which schools compete in recruiting student-athletes are immune from challenge under the antitrust laws[,]" Pet. at 14;

- "that intercollegiate agreements in which NCAA schools collectively fix the terms on which they compete for student athletes are not subject to the antitrust laws at all[,]" *id.* at 15;

- "that members of the NCAA are permitted to enter into unreasonable restraints on competition with complete impunity — as long as they are directed at student-athlete eligibility[,]" *id.* at 17;

- "that student-athletes cannot challenge NCAA Rules . . . [,]" *id.* at 19; and

- that "NCAA agreements restricting competition for student-athletes [are] immune from challenges by the very individuals whose opportunities the agreements are designed to restrict[,]" *id.* at 21.

These statements are outright fabrications. In fact, according to the Seventh Circuit itself, what it *held* was "that Banks' failure to allege an anti-competitive impact on a discernible market justified the district court's dismissal for failure to [state a] claim upon which relief can be granted." Pet. App. at 27a. The dissent characterized the majority's holding this way: "Banks has not alleged that the rules are anticompetitive in the first instance[.]" *Id.* at 37a. While Banks's desire to frame an issue that will pique this Court's interest is understandable, his distortion of the Seventh Circuit opinion is not. Indeed, the scrutiny to which both the majority and the dissent subjected Banks's Amended Complaint belies his assertion that the appellate court held, or even thought it was holding, that eligibility rules like these are totally exempt from the antitrust laws.

Instead, all the Seventh Circuit did was to rule that Banks, like any other plaintiff with a rule of reason claim under Section 1 of the Sherman Act, is required to explain *how* the agreement he challenges injures the process of competition in some relevant market. Because Banks could not, his case was properly dismissed. As the Seventh Circuit explained:

> We agree with the district court's finding that the plaintiff has failed to allege an anti-competitive effect on a relevant market; at best Banks has merely attempted to frame his complaint in antitrust language. While Banks alleges a restraint on the market of college football players, college institutions who are members of the NCAA, and perhaps an NFL player recruitment market, *the complaint fails to explain how these alleged restraints diminish competition in or among the markets.*[4] In our review of Banks' arguments in his appellate briefs as well as our review of the oral argument, we have been unable to discern a cogent argument articulated even on appeal that the alleged restraints impose an anti-competitive effect on the alleged markets. The appellant merely claims that there is an anti-competitive effect, but he fails to explain what it is.

Id. at 26a (footnote omitted); *see also id.* at 14a-15a (Banks fails to allege an anticompetitive effect or explain how the no draft rule restrains trade); *id.* at 25a (Banks fails to illustrate how the NCAA rules diminish competition).

Banks also incorrectly states that the Seventh Circuit has now gone farther than other courts, specifically the Fifth Circuit, in immunizing NCAA rules from antitrust review. Pet. at 17. In fact, six other federal courts have examined whether NCAA eligibility rules violate the Sherman Act and, in every case, have concluded they do not. *See McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988); *Gaines v. NCAA*, 746 F.Supp. 738 (M.D. Tenn. 1990); *United States v. Walters*, 711 F.Supp. 1435, 1441-42 (N.D. Ill. 1989);[5] *Justice v. NCAA*, 577

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[4]Banks misleadingly quotes only the first part of this sentence, Pet. at 14, omitting the conclusion that he failed to explain how competition was diminished by the rules he challenged.

[5]The NCAA was not a party to this case. In *Walters*, the United States government argued "that the NCAA eligibility requirements and principles of amateurism adopted by the universities do not constitute unreasonable restraint [sic] of trade in violation of the Sherman Act." 711 F.Supp. at 1441. The district court agreed. *Id.* at 1442.

F.Supp. 356, 382-83 (D. Ariz. 1983); *Jones v. NCAA*, 392 F.Supp. 295, 303-04 (D. Mass. 1975); *College Athletic Placement Serv., Inc. v. NCAA*, 1975 Trade Cas. (CCH) ¶ 60,117 (D.N.J.), *aff'd*, 506 F.2d 1050 (3d Cir. 1974); *cf. Hennessey v. NCAA*, 564 F.2d 1136, 1153-54 (5th Cir. 1977) (NCAA rule limiting number of assistant coaches upheld under rule of reason). *Unlike* the Seventh Circuit in this case, three of these courts *expressly* held that NCAA eligibility rules are exempt from the antitrust laws. *See Gaines*, 746 F.Supp. at 744-45; *Jones*, 392 F.Supp. at 303; *College Athletic*, 1975 Trade Cas. at 65,267. However, even these three courts proceeded to examine whether the rules are anticompetitive. *See Gaines*, 746 F.Supp. at 745-47; *Jones*, 392 F.Supp. at 303-04; *College Athletic*, 1975 Trade Cas. at 65,267.

Banks claims that some of these courts "misread" this Court's pronouncement in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), that NCAA eligibility rules, by defining the unique product of college football, "widen consumer choice . . . and hence can be viewed as procompetitive." *Id.* at 101-02. These courts did not "misread" *Board of Regents* — these courts precisely applied the principles discussed in *Board of Regents* to decide *not* that NCAA rules are "immune" from the antitrust laws, but that, under the rule of reason, eligibility rules do not violate the Sherman Act because they do not harm competition. *See McCormack*, 845 F.2d at 1344-45; *Gaines*, 746 F.Supp. at 747; *Walters*, 711 F.Supp. at 1441-42.

II. THE SEVENTH CIRCUIT'S ANALYSIS OF THE ESSENTIAL ELEMENTS OF A RULE OF REASON CLAIM IS CONSISTENT WITH THE OPINIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS AND DOES NOT CONSTITUTE A QUESTION MERITING REVIEW ON CERTIORARI.

In declaring that Banks had to explain how the no draft and no agent rules injured competition in some relevant market in order to withstand a motion to dismiss, the Seventh Circuit

was applying well-established precedent involving rule of reason cases under Section 1 of the Sherman Act. In *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985), for example, the Seventh Circuit explained:

> The fundamental requirement . . . is that of a sufficient allegation of anticompetitive effects that would result or have resulted from the defendants' actions; the absence of such allegations is ordinarily fatal to the existence of a cause of action. The purpose of the Sherman Act is to rectify the injury to consumers caused by diminished competition . . . . Thus, the plaintiff must allege, not only an injury to himself, but an injury to the market as well.

Id. at 1107 (footnote and citations omitted); *see also Hennessy Indus. v. FMC Corp.*, 779 F.2d 402, 404 (7th Cir. 1985) (rule of reason complaint properly dismissed because plaintiff did not allege an injury to competition); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983) (rule of reason complaint deficient because "[p]laintiff has not alleged any anticompetitive effect . . ."); *Havoco of America v. Shell Oil Co.*, 626 F.2d 549, 556-59 (7th Cir. 1980) (rule of reason complaint properly dismissed where there was no allegation of a harmful effect on a generalized market).

This principle — that an injury to competition in the market as a whole is an essential element of a rule of reason claim — is not peculiar to the Seventh Circuit. Numerous courts in other circuits have similarly dismissed antitrust complaints pursuant to Rule 12(b)(6) where there was no allegation, express or implied, of injury to the market. *See, e.g., Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 507-09 (9th Cir. 1989) (affirming Rule 12(b)(6) dismissal because plaintiffs did not allege injury to competition); *Garshman v. Universal Resources Holding Inc.*, 824 F.2d 223, 230-31 (3d Cir. 1987) ("What is . . . missing . . . is any allegation of an adverse effect upon competition"); *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 488 (8th Cir. 1985) (complaint should have been dismissed because it failed to allege any anticompetitive

effects within the relevant market); *Five Smiths, Inc. v. National Football League Players Ass'n*, 788 F.Supp. 1042, 1051-54 (D. Minn. 1992) (complaint deficient because plaintiffs allege only injury to themselves, but fail to allege an injury to competition in the market); *Retail Service Assocs. v. ConAgra Pet Products Co.*, 759 F.Supp. 976, 979-80 (D. Conn. 1991) ("'There must be some allegation of public injury to competition . . .'"); *American Standard Life & Accident Ins. Co. v. U.R.L., Inc.*, 701 F.Supp. 527, 537-38 (M.D.Pa. 1988) (complaint fails to allege an injury to competition).

In contending that his Amended Complaint adequately alleged a restraint of trade and injury to himself, Banks misses the fundamental point that under the antitrust laws, an injury to a competitor is *not* equivalent to an injury to competition. As this Court has declared, "The antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*[.]'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis original; quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). No one disputes that Braxston Banks was injured when he could not play a fifth year at Notre Dame. However, unless Banks can explain how the *process* of competition in the market was also injured, he does not state an antitrust claim.

All Banks does is to assert conclusorily that the NCAA eligibility rules restrain trade. *See, e.g.*, Pet. App. at 85a-86a; Pet. at 8. But, as this Court explained in *Board of Regents*, *all* agreements restrain trade:

> There can be no doubt that the challenged practices of the NCAA constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.

468 U.S. at 98 (footnote omitted). Under the Sherman Act, an unreasonable restraint of trade is one that injures competition. *See id.* at 103-04.

This Court also explained in *Board of Regents* what is meant by an injury to competition. The NCAA television plan at issue in that case injured competition because it resulted in lower output and higher prices. *Id.* at 99-100, 104-08. Similarly, in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), this Court stated that the market injury that is an essential element of a rule of reason claim involves some showing that price, quality, supply, or demand has been affected by the challenged restraint. *See id.* at 29-32. Indeed, this Court said the same thing almost fifty years earlier, declaring that the restraints of trade that are condemned by the Sherman Act are those that "restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . . ." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940); *see also id.* at 497-98, 500-01, 512.

From the inception of this case in the district court, the NCAA has repeatedly asked Banks to explain *how* the no draft and no agent rules injure competition, i.e., distort price or output, or affect quality, supply, or demand in *any* relevant market. Despite numerous opportunities in the district court, in the Seventh Circuit, and now in his Brief to this Court, Banks has utterly failed to do so. Although Banks defined two markets — one in which colleges compete for football players and a second market in which NFL teams recruit college players, Banks has offered *no explanation* of how these two rules affect price, quality, supply, or demand in either of these markets. Indeed, the eligibility rules do not affect *any* of these economic factors. As the district court observed, "[T]he rules affect neither the players' ability to receive financing for their education nor the schools' opportunity to compete for athletes." Pet. App. at 77a.

Banks tries to circumvent this fatal flaw in his case by suggesting that since excluded athletes in cases like *Boris v. United States Football League*, 1984-1 Trade Cas. (CCH) ¶ 66,012 (C.D. Cal. 1984), *Linseman v. World Hockey Ass'n*, 439 F.Supp. 1315 (D. Conn. 1977), and *Denver Rockets v. All-Pro*

Management, Inc., 325 F.Supp. 1049 (C.D. Cal.), *injunction reinstated*, 401 U.S. 1204 (1971), stated a claim under the antitrust laws, he should be permitted to proceed with his case as well. *See* Pet. at 21 n.9. These cases, however, were decided under the per se rule. *See Boris*, 1984-1 Trade Cas. (CCH) at 68,463; *Linseman*, 439 F.Supp. at 1323; *Denver Rockets*, 325 F.Supp. at 1063-66. Unlike the rule of reason, the per se rule presumes market injury, and the plaintiff is not required to plead or prove an injury to competition in the market. Banks admits that his claims fall under the rule of reason. *See* Pet. App. at 57a. He thus cannot avoid his obligation to allege some market injury simply by citing *Boris*, *Linseman*, and *Denver Rockets*.

Although Banks himself could not articulate any anticompetitive effect of NCAA eligibility rules, the dissent in the Seventh Circuit inferred the missing element, market injury, from Banks's Amended Complaint by equating the NCAA's no draft rule to a "term of employment" in a college football labor market. *See* Pet. App. at 30a-32a. The dissent concluded that by agreeing on the no draft rule, colleges were, in effect, fixing the "price" they offered to student athletes. *Id.* at 32a. However, in antitrust terms, "price" cannot be so broadly construed. Just recently, Ivy League colleges and MIT were found to have fixed the price they charged for education by agreeing on how to calculate scholarship offers. *See United States v. Brown University*, 805 F.Supp. 288 (E.D. Pa. 1992), *appeal filed*, (3d Cir.). Although defendant MIT argued that colleges also compete in terms of the quality of "the curriculum, campus life, vocational opportunities and reputation" — the same factors listed by the dissent in the present case — there was no suggestion in *Brown* that price competition under the antitrust laws therefore includes such intangibles. *Id.* at 304.

Moreover, as the majority noted, by the dissent's logic, *every* NCAA eligibility requirement is arguably anticompetitive. Pet. App. at 17a. No doubt some players would like it if colleges "competed" by waiving minimum semester-hour require-

ments, by letting young men play football even if they had not graduated from high school, or by compensating players with cash instead of with an education. If the dissent is correct, these factors are all "terms of employment," and Banks should have amended his complaint to allege these "violations" as well. Contrary to the dissent's conclusion, in antitrust terms, price means price — and it clearly does not mean eligibility requirements in an educational setting.

As Banks does, the dissent also cited *Radovich v. National Football League*, 352 U.S. 445 (1957), and *Nichols v. Spencer International Press, Inc.*, 371 F.2d 332 (7th Cir. 1967), for the proposition that a complaint by a "supplier of labor" challenging an agreement among employers states a claim under the Sherman Act. *See* Pet. App. at 30a; Pet. at 20-21. In *Radovich*, the principal issue before this Court was whether the baseball exemption from the antitrust laws should be extended to professional football. 352 U.S. at 447. Deciding that it should not, this Court then considered whether the plaintiff, a football player who had been blacklisted, stated a claim under the Sherman Act. *Id.* at 452-53. This Court did not mention the rule of reason, much less the requirement of an injury to competition, because that was not an issue. A careful reading of the opinion reveals, however, that Radovich *did* allege an injury to the market — but *not* the labor market. The injury to competition in *Radovich* was that the challenged boycott crippled a rival, upstart league, strengthening the monopoly of the NFL. *Id.* at 449.

Likewise, in *Nichols*, the anticompetitive effect which led the Seventh Circuit to reverse the district court's summary judgment for the defendants was that the defendant publishers' agreement not to hire each other's employees for six months thwarted the market entry of new firms and arguably restrained trade in the products by *impairing the supply* of encyclopedias *to the public*. 371 F.2d at 336-37.

Contrary to the dissent's conclusion and to Banks's argument, there is *no analogous market injury* inflicted by the

NCAA's no draft and no agent rules in this case. No rival league is crippled; no new team is prevented from entering the market and "hiring" players; and the supply of college football *to the public* is not affected *at all*.

In fact, any discussion of how the public — consumers — are injured by NCAA eligibility rules is conspicuously absent from Banks's allegations and his arguments. According to this Court, "'Congress designed the Sherman Act as a "consumer welfare prescription[,]"'" and it is consumers' interests that courts protect in enforcing it. *Board of Regents*, 468 U.S. at 107 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)). As the district court observed, "[Banks] has demonstrated *no harm to consumer welfare* apart from the consumers' inability to see him play football this fall, a harm for which he must bear significant responsibility." Pet. App. at 67a.

In short, the Seventh Circuit did not affirm the dismissal of Banks's Amended Complaint because it found that NCAA eligibility rules are "exempt" from the antitrust laws. The Seventh Circuit did not rule that "members of the NCAA are permitted to enter into unreasonable restraints on competition with complete impunity . . . ." Pet. at 17. The Seventh Circuit simply declared, consistent with the pronouncements of this Court and numerous other lower courts, that where an antitrust plaintiff cannot explain how the restraint he challenges is "unreasonable" in the antitrust sense, that is, how it injures competition, his complaint should be dismissed. There is nothing so special, important, or remarkable about this ruling that certiorari should be granted.

III. NEITHER LOWER COURT IMPROPERLY WEIGHED THE PROCOMPETITIVE EFFECTS OF NCAA ELIGIBILITY RULES ON A MOTION TO DISMISS.

Banks's secondary argument in support of review is that the Seventh Circuit improperly weighed the procompetitive effects of the no draft and no agent rules in deciding a motion to

dismiss. Pet. at 23. Banks made the same argument to the Seventh Circuit, contending the district court had improperly considered the procompetitive effects of NCAA rules. Pet. App. at 10a. The Seventh Circuit rejected that argument because the basis of the district court's decision was *not* the procompetitive effects of NCAA rules, but Banks's failure to allege an anticompetitive effect *at all*. *Id.* at 10a-11a.

Banks states that in support of the NCAA's motion to dismiss, the NCAA claimed that "its Rules were reasonable . . . [,]" "the Rules were essential to preserve the procompetitive aspects of intercollegiate sports[,]" and "the Rules fostered competition. . . ." Pet. at 9, 23. These statements by Banks are bald misrepresentations of the record. In fact, on the motion to dismiss, the NCAA did *not* argue that its eligibility rules were procompetitive, but argued only that Banks's claim was deficient because he failed to allege how the no draft and no agent rules injured competition in any market. In fact, the *only* time in *any* of its briefs on the motion to dismiss in the district court and in the Seventh Circuit that the NCAA even asserted that these two eligibility rules had procompetitive effects was in the following sentence:

> The NCAA did not argue that Banks's Amended Complaint should be dismissed because NCAA eligibility rules are procompetitive (although they are), but because the Amended Complaint failed to allege the essential element of an injury to competition in any relevant market.

Brief of Appellee at 7-8.

Again, Banks is attempting to create an issue where there is none. The only antitrust issue on the merits before the district court and before the Seventh Circuit was whether Banks alleged an injury to competition in the first instance. The Seventh Circuit *did* discuss the procompetitive effects of NCAA rules in responding to points raised by the dissent. *See* Pet. App. at 14a-25a. However, as explained above, this was not its holding, nor was it even the basis of its holding.

Moreover, Banks's contention that because his Sherman Act claims fall under the rule of reason, his case should not have been dismissed without a *full* evidentiary hearing is tantamount to an assertion that rule of reason complaints are somehow exempt from Rule 12(b)(6). *See* Pet. at 24-25. As numerous courts have explained, they are not. *See, e.g.*, *Les Shockley*, 884 F.2d at 507-09; *Garshman*, 824 F.2d at 230-31; *Hennessy*, 779 F.2d at 404; *Razorback*, 761 F.2d at 488; *Car Carriers*, 745 F.2d at 1109-10; *Havoco*, 626 F.2d at 556-59; *Five Smiths*, 788 F.Supp. at 1051-54; *Retail Service*, 759 F.Supp. at 979-80; *American Standard*, 701 F.Supp. at 537-38. Like the complaints in those cases, because Banks's Amended Complaint failed to allege an essential element of his cause of action — an injury to competition in the market — his case was properly dismissed.

IV. THE SEVENTH CIRCUIT'S HOLDING THAT BANKS LACKED STANDING BECAUSE HIS CLAIM FOR INJUNCTIVE RELIEF ON BEHALF OF AN UNCERTIFIED CLASS WAS MOOT WAS COMPELLED BY THE UNAMBIGUOUS RULINGS OF THIS COURT.

With his Amended Complaint, Banks sought a permanent injunction on behalf of a class (but not himself) enjoining the NCAA from enforcing the challenged rules against the members of the class. Pet. App. at 88a-89a. The class that Banks sought to represent was never certified.

Banks's own Amended Complaint conceded that his claim for injunctive relief was moot as to him because he no longer sought an order that would permit him to play football for Notre Dame. *Id.* at 85a, 88a.

Applying this Court's decision in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), the Seventh Circuit held that Banks lacked standing to seek an injunction on behalf of the uncertified class because his own personal claim was moot. Pet. App. at 7a-9a. The court of appeals noted that the requirement that the named plaintiff maintain a personal stake throughout the litigation "'can be avoided through certification of a class prior to expiration of the named plaintiff's personal

claim[,]'" *id.* at 8a (quoting *Geraghty*, 445 U.S. at 398), which had not occurred here.[6]

In analyzing the standing issue, the court of appeals also considered an exception to the mootness principle, explaining that "'[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" *Id.* at 9a (quoting *Geraghty*, 445 U.S. at 399). The court of appeals found, however, that Banks had nearly four months between the NFL draft and the start of Notre Dame football practice to bring his claim for injunctive relief and that his alleged injury was not "so inherently transitory" as to fit within this exception. *Id.*

Banks's Petition articulates no basis for challenging the court of appeals' conclusion. The only hint of what Banks perceives to be error is contained in the "Questions Presented" statement on a preliminary page of his Petition, which asserts that the court of appeals' holding was based on its "assessment of facts that were neither presented to, nor found by, the district court[.]" Pet. at i.

The NCAA cannot imagine to what "facts" Banks refers. The court of appeals relied on only four facts to determine the standing issue: (1) that a class had never been certified; (2) that Banks no longer sought to play football for Notre Dame; (3) that Banks entered but was not selected in the NFL draft held April 22-23, 1990; and (4) that Notre Dame's football practice began August 17, 1990. *See* Pet. App. at 7a-9a. The first fact is obvious from the district court's record of proceedings; the latter three facts are all contained in Banks's own pleadings.

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[6]Banks notes in his Petition that the issue of class certification had been deferred by agreement of the parties and the district court, Pet. at 9, apparently hoping this Court will infer that Banks was lulled to his prejudice into inaction with respect to seeking certification. What Banks neglects to mention is that his claim for injunctive relief was indisputably moot *before* the district court and counsel agreed to defer the certification issue. *See* Pet. App. at 85a, 88a; "Joint Motion for Scheduling Order and Postponement of Joint Status Report and Telephonic Status Conference," filed October 31, 1990; Order entered November 6, 1990. Banks's Amended Complaint, which concedes mootness, was filed August 30, 1990.

See Pet. App. at 84a-85a, 88a; "Complaint — Class Action — For Injunctive Relief," filed August 9, 1990, ¶ 21.

Banks concedes that the court of appeals' resolution of the standing issue is not itself worthy of review. Its ruling is also unassailable and should not be reviewed by this Court in any event.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRAXSTON LEE BANKS,

Petitioner,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Most of the NCAA's opposition is devoted to trying to establish that petitioner's complaint was not dismissed because there is an antitrust immunity for eligibility rules or because the members of the NCAA are immune from antitrust suits brought by student athletes. Instead, according to the NCAA, petitioner's downfall was his failure to allege

an antitrust injury, despite the fact that the NCAA and the lower courts had given him every reasonable opportunity to cure the defect.

But this Court will search the opposition in vain to find out what kind of injury *would* have sufficed to meet the requirements of the antitrust laws, just as it will not find that answer in the opinion of the majority below. The reason is that, under the NCAA's theory, there is no credible antitrust injury that any student athlete could allege. Indeed, the allegations of injury made in the complaint and repeated both in the NCAA's Opposition (4-5) and the opinion of the majority (13a-14a) cover all possible injuries that any person in petitioner's position could reasonably have alleged. The NCAA underscores this by conceding that the allegations would be sufficient to allege a *per se* violation of the antitrust laws. Opposition at 14. Thus, while the NCAA implies that others might succeed where petitioner has failed, if they could allege a proper antitrust injury, its argument, and the decision below, preclude *any* student athlete from bringing an antitrust claim, and effectively immunize the NCAA and its eligibility rules from antitrust scrutiny.

Any doubt about this is dispelled by the NCAA's insistence that petitioner cannot allege an antitrust injury because it is only injury to competition, not to a competitor, that is covered by the Sherman Act, Opposition at 12, citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). The principal difficulty with that contention -- aside from the fact that the NCAA is relying on a case involving allegedly unfair competition between competitors, whereas this case involves a horizontal agreement among competitors -- is the narrow manner in which the NCAA interprets "competition." Under the NCAA's reinterpretation of these precedents horizontal agreements to fix the terms upon which employers compete for employees cannot be challenged based on the injury to those who are the targets of such agreements. Thus, according to the NCAA, workers

victimized by a price fixing agreement among all employers cannot sue under the antitrust laws *unless* there is an injury to someone else besides the workers, such as to "a rival upstart league" in *Radovich v. National Football League*, 352 U.S. 445 (1957), or by "*impairing the supply* of encyclopedias *to the public*" in *Nichols v. Spencer International Press, Inc.*, 371 F.2d 332 (7th Cir. 1967) Opposition at 15 (emphasis in original). Here, petitioner did allege a possible injury to the NFL, but did not allege any injury to any other "rival" to the NCAA because it is the dominant organization for college athletes and has no competitors.

Under the NCAA's strained interpretation of *Nichols*, perhaps the petitioner could have alleged injury to football fans as the ultimate "consuming public" for whom the antitrust laws are intended. Assuming that loss of enjoyment from not having a particular player on a team for which a given fan roots is cognizable injury under the antitrust laws, it would be extremely difficult to prove who is injured, or that one fan's loss is not another's gain. But more fundamentally, does the NCAA really mean that direct monetary losses suffered by the student athletes are outside the scope of the antitrust laws, but that emotional injuries to fans are within them?

In petitioner's view, the NCAA's Opposition and the ruling of the majority below are nothing more than a smokescreen for the real bottom line: student athletes can never mount an antitrust challenge to the NCAA's eligibility rules, no matter how seriously the rules affect their careers and finances, because those kinds of injuries are not within the antitrust laws. And they maintain that position despite this Court's ruling in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), in which members of the NCAA were allowed to sue the NCAA under the same antitrust laws relied on here,

over NCAA rules that had the same limiting effects on competition among NCAA schools as those at issue here. The sole difference in the two cases is that the victims here are student athletes, who had no role in the issuing of the rules, whereas the "victims" in *Board of Regents* were NCAA members who did not like the results that their fellow members had approved.

Even in its response to petitioner's argument that the lower courts improperly weighed the allegedly pro-competitive effects of the no-draft and no-agent rules against their anticompetitive effects, the NCAA returns to the same "no antitrust injury" refrain. Its principal argument is not that such weighing is proper on a motion to dismiss in a rule of reason case, but that no such weighing is required where, as here, the plaintiff failed "to allege an anticompetitive effect *at all*." Opposition at 17 (emphasis in original). Thus the NCAA impliedly concedes that, if the lower courts engaged in such a process on a motion to dismiss, it was error to do so, and is left to defend the judgment below on the ground that a horizontal agreement among NCAA member schools, when characterized as an eligibility rule, is not within the purview of the antitrust laws, at least when challenged by a student athlete. Whether characterized as an exclusion, or an immunity, or a limitation on antitrust coverage, that result is inconsistent with opinions of this Court and the entire thrust of the antitrust laws, which are designed to protect victims of the very type of horizontal agreements at issue here. Accordingly, review is warranted to prevent the creation of a major hole in the laws that this Court has described as the "Magna Carta of free enterprise," *United States v. Topco Associates*, Inc., 405 U.S. 596, 610 (1972).

CONCLUSION

For the foregoing reasons and those previously stated, certiorari should be granted.

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